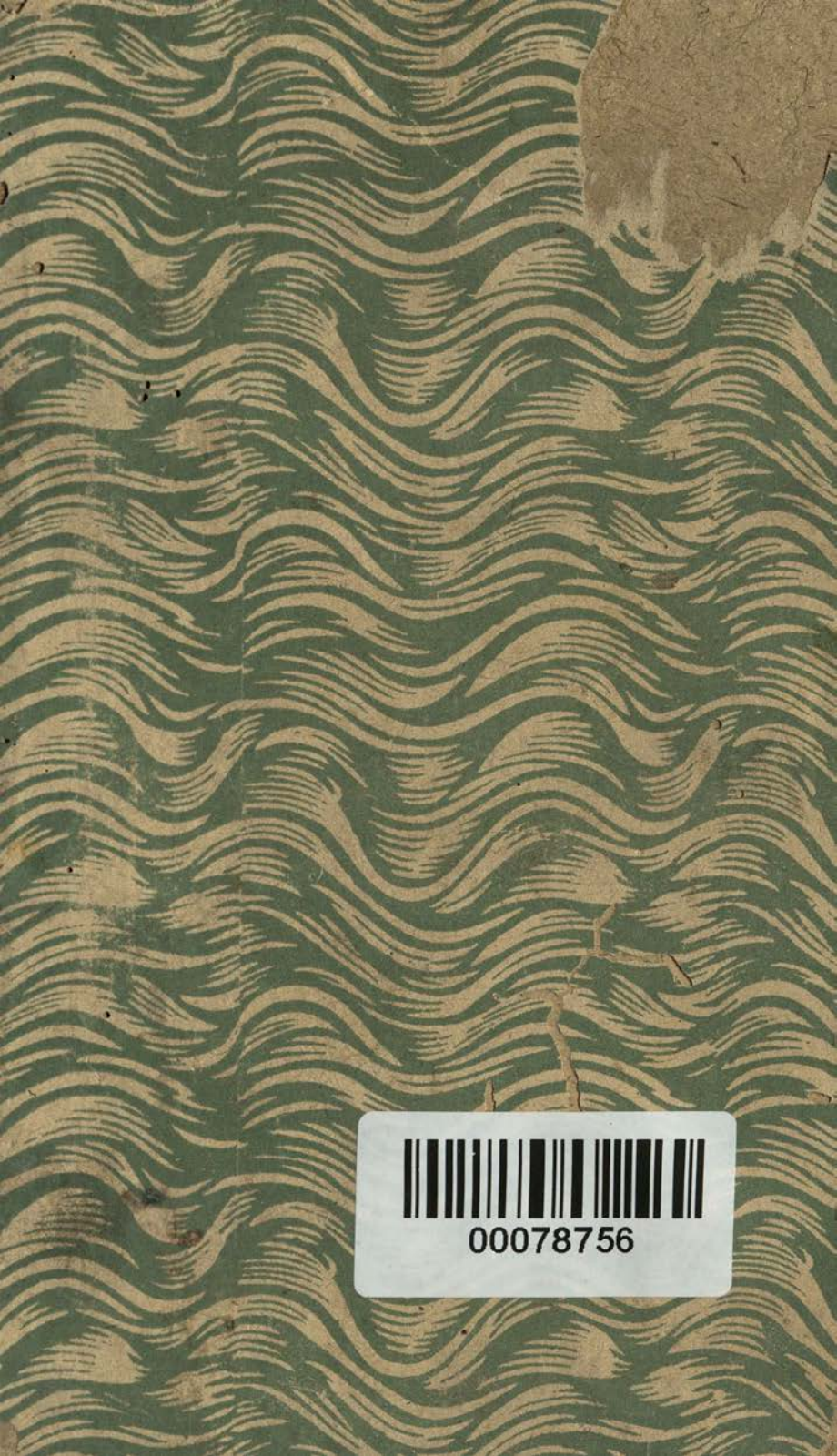
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THE FREDERICIAN CODE;

OR,

A BODY OF LAW

FOR THE

DOMINIONS

OF

The KING of PRUSSIA.

Founded on Reaſon, and the Conſtitutions of the Country.

Tranſlated from the FRENCH.

IN TWO VOLUMES.

VOLUME I.

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MDCCLXI.

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TO

The RIGHT HONOURABLE

JOHN EARL of BUTE;

Whoſe inclinations concur with the duty of his office to adviſe and promote good Laws:

The following TRANSLATION of thoſe of the KING of PRUSSIA,

Is moſt humbly inſcribed by

His LORDSHIP'S

Moſt obedient, and

Moſt humble ſervant,

The TRANSLATOR.

A ſummary view of the King's plan for the regulation of judicial proceedings *.

I. *Neceſſity of ſociety.*

MAN is born for ſociety. Whenever he has the misfortune to be excluded from it, his condition is in nothing different from that of the brute creation, and all his talents remain uncultivated.

II. *Neceſſity of order in ſociety.*

But ſociety cannot be maintained, or, at leaſt, it cannot procure to man the real advantages that he needs, unleſs order be preſerved in it. It is this order which diſtinguiſhes poliſhed nations from ſavage, and puts thoſe, at leaſt, as much above theſe, as the latter are above brutes.

III. *Three kinds of irregularities in ſociety.*

Nevertheleſs, the ſocieties in which order ſeems beſt eſtabliſhed, are ſtill expoſed to various irregularities. Of theſe there are reckoned three principal kinds, law-ſuits, crimes, and wars. Wars are regulated by the law of nations; crimes and law-ſuits furniſh matter for civil laws; but our ſubject calls us only to the conſideration of law-ſuits, cauſes, actions, or proceſſes.

IV. *Three ways of terminating proceſſes.*

All proceſſes whatever, between perſons of all denominations, not excepting communities, may be terminated by three ways eſpecially, voluntary agree-

* By M. FORMAY, Perpetual Secretary to the Royal Academy of Sciences and Belles Lettres at Berlin.

ment between the parties concerned, arbitration, and legal procedure, whether a party be brought, or wants to bring his adverſary, before a judge.

V. *Legal procedures, and their intention.*

The two firſt ways being rarely ſufficient, and cauſes being rather quieted for ſome time than decided by their means, there muſt be in every well-regulated ſtate, tribunals, or courts of juſtice, and legal procedures, or trials at law. But as thoſe trials are only intended to diſcover truth, by giving opportunity to the parties to ſhow it, and to eſtabliſh their rights; the plain and natural method in thoſe procedures would be to bring the parties before the judge, to explain the facts in their cauſe of difference, that, on hearing them, he might immediately pronounce the judgment which they deſerve.

VI. *Abuſes which have been introduced into them.*

Every body however knows how far juſtice is from being adminiſtered in ſo ſummary a manner. The thing is even impracticable in poliſhed ſtates, in very many differences, as we ſhall ſee in the ſequel *. But the miſchief is, that, inſtead of ſticking to what is eſſential in judicial procedures, many erroneous and ſuperfluous things have been intermingled, which leave an open field for malignity, for falſehood, and for all the kinds of injuſtice which we ſee multiplied in proceſſes. Things were come to that paſs, that men of ſenſe abhorred law-ſuits, and choſe rather to ſuffer conſiderable loſſes, than to be engaged in an endleſs labyrinth. But with all this, as there are, nor can be, none but ſovereigns who enjoy a right of doing themſelves juſtice, there are an infinity of

* See § 20.

caſes,

caſes, in which recourſe to a judge is indiſpenſably neceſſary.

VII. *Inconveniencies of law-ſuits.*

That method is then become odious, as we have juſt inſinuated, and chiefly on account of the extreme tedioufneſs of law-ſuits. Thence ariſes a multitude of inconveniencies, equally hurtful to the parties immediately concerned in the actions, and to the whole ſtate. Such are the uneaſineſs and diſquiet which agitate the minds of perſons at law; the animoſities ariſing, fomented, and perpetuated between the parties; the ruinous expenſes which abſorb the cleareſt part of the controvertible ſubjects, the ſettlements miſſed by many perſons who might have puſhed their way in all kinds of ſtates and profeſſions, if their fortunes had not depended on the deciſion of their proceſſes; and, in fine, the very great difficulty that ſtrangers make to come and ſettle in countries where law-ſuits are frequent and tedious.

VIII. *Remedies.*

So many evils united, and proceeding from one ſource, certainly merited endeavours to procure ſome remedies for them. It is even ſurpriſing, that, in the beſt poliſhed ſtates of Europe, no methods effectual for that purpoſe have hitherto been deviſed. It is not in the total abolition of law-ſuits that it muſt be ſought; that, we have ſaid, is impoſſible; but in the ſhortening of judicial procedures. The queſtion is only to preſcribe a proper form, which may effectually leave, on one ſide, all the aſſiſtance neceſſary to diſcover and eſtabliſh a perſon's right; but which may, on the other hand, diſappoint the effect of ſo many tricks and artifices, as men who are enemies to juſtice and order, have invented for obſcuring affairs by perplexing them with delays, and

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to elude the judgments to which they are afraid to ſubmit. Theſe are the difficulties and ſubterfuges, from the immenſe collection of which the monſter of chicane has been formed.

IX. *What Louis* XIV. *has done in that reſpect.*

A king, to whom nobody conteſts the glory of having in ſeveral reſpects increaſed the ſplendour of his kingdom, Louis XIV. diſcovered thoſe evils, and endeavoured to remedy them. With this intention he cauſed publiſh the ordinance of 1667, which makes part of the Louiſian Code. It contains the eſtabliſhment of one uniform and ſummary courſe of procedure, in all the courts and juriſdictions of the kingdom of France, and it has always been regarded as one of the greateſt advantages which that prince has procured to his ſubjects.

X. *The King's views.*

The King having remarked, that, in every province of his dominions, there was anciently introduced a ſtyle and peculiar method of procedure, and that thence frequently aroſe incidents ſo perplexing, that he was obliged to bring moſt cauſes before his own council, conceived the plan of reducing all to one uniform courſe of procedure, by which all actions might be ſolidly prepared for hearing, and terminated by three inſtances in the courſe of a year.

XI. *An experiment made in Pomerania.*

After communicating this plan to his high chancellor, the King wanted him to make an eſſay of it. For that purpoſe, his Majeſty ordered to begin with Pomerania, a vaſt province which anciently was called *Terra litigioſa*, on account of the diſpoſition of its inhabitants, who, though perſons of candour and honeſty,

jeſty, nevertheleſs create very frequent law-ſuits to each other, from animoſity, or ſome other falſe point of honour.

XII. *Conſequence of that experiment.*

The execution having fully anſwered expectation, the King ordered his high chancellor to draw up an ample ſcheme of ordinances, and to get it practiſed proviſionally in all his dominions, by all the tribunals and courts of judicature, injoining them to make afterward their obſervations and remonſtrances upon the difficulties that might occur in the execution of that plan, that previous care might be taken of it before the laſt hand were put to that ordinance.

XIII. *Extent of the new ordinance.*

Even in a curſory peruſal, it is ſoon obſervable, that it includes every thing eſſential to trials in civil cauſes, of what nature ſoever they be. It differs not only in matter and form from that of Louis XIV. but is much more extenſive and complete, ſo that it will not need the aſſiſtance of the Roman and Canon laws to extend and interpret it.

XIV. *Limits within which the author confines himſelf.*

I ſhall now then proceed to the main ſcope of this view, and give a rational idea of his Majeſty's plan. But I do not intend to enter into a detail which might carry me too far, and which is only proper for lawyers. I reſtrict myſelf to a general view, which may ſhow, even to perſons who have no tincture of juriſprudence, the beauty and accuracy of this plan.

XV. *Neceſſity of preſerving certain methods of procedure.*

As trials at law (§ 5.) are deſigned only to ſet the diſputes

diſputes of parties in a clear light, and give the judges a ſufficient knowledge of the queſtions and their circumſtances, it might at firſt ſeem poſſible to retrench all judicial procedures, or at leaſt reduce them to the ſingle appearance of parties before the judge to explain their differences, and immediately receive their ſentence. But we have promiſed to ſhow that this method is not practicable. In fact, though it might be done in ſome very ſlight matters, which might eaſily be explained by the parties themſelves, there remain always a vaſt number of knotty and perplexed caſes, which concern the honour and fortune of the ſubjects, and in which the ableſt and moſt upright judges and advocates have occaſion for all their ſagacity to diſcover the true from the falſe, the juſt from the unjuſt. This will not ſeem ſurpriſing to a perſon of the ſmalleſt reflection on the infinite variety which every moment appears in the actions of mankind, from which law-ſuits ariſe. In fact, what a diverſity is there in the play of the paſſions? Do not their laws and effects preſent a theory more complicated than that of mechanics? Do not they ſuggeſt to men all thoſe oblique methods in ſuch multiplicity of ways? And if injuſtice has an art of embarraſſing affairs, muſt not juſtice have an art of diſembarraſſing them?

XVI. *Uſe and abuſe of the advocates office.*

There was a neceſſity then, (and it was perceived in all poliſhed ſtates), to eſtabliſh advocates, who, by their learning and experience, might acquire the underſtanding and ſkill neceſſary for diſcuſſing the moſt complicated affairs; that might be capable of giving counſel on the caſes propoſed to them, and of pleading or writing in name of the parties who intruſt them with their cauſe. Senſible perſons, favourers of order and juſtice, have, in all times, acknowledged

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the neceſſity of that eſtabliſhment. To aboliſh it entirely, would really be to fall into barbarity and tyranny, as is obvious in the manner of adminiſtering juſtice in Turky. But every thing has two ſides, and here is the reverſe of the medal. Advocates, inſtead of diſpaſſionately repreſenting their clients, inſtead of ſupporting ſolely the intereſts of juſtice and truth, have been the firſt to uſe ſuppoſitions in their facts, diſhoneſty and trick in their reaſonings: they have employed lies, artifice, and all kinds of iniquity, to prolong law-ſuits and defend bad cauſes. To repreſs thoſe abuſes, is the chief intention of the effectual methods contained in the plan which we are now unfolding.

XVII. *Unworthy and ſcandalous advocates diſmiſſed.*

The firſt of thoſe methods is to ſuppreſs and diſmiſs all ſuch as, intruding themſelves into the buſineſs of an advocate, without any call, without talents, without probity, have hitherto only been the public blood-ſuckers and firebrands of ſociety. The ſame is the caſe with thoſe, who, after beginning the office of advocate without any irregularity, have afterward degenerated, and become guilty of manifeſt injuſtices. The firſt act of royal juſtice in the regulation of juriſprudence, is to prohibit for ever from officiating the advocates who are in the caſes juſt mentioned. In order to be truly certified of their being blameable, the King has inſtructed the commiſſion eſtabliſhed for the regulation of judicatories, carefully to examine all the undetermined cauſes, and to diſcover the cauſe of delay, ariſing from the incapacity and malice of advocates. How grievous ſoever the conſequences of that juſt ſeverity may be with regard to their private fortune, they have however no cauſe to complain, nor right to claim compaſſion, ſince there is no compariſon between thoſe miſchiefs which they

have brought upon themſelves, and thoſe which they have occaſioned in ſociety.

XVIII. *Trials required for the future of advocates.*

In the ſecond place, in order to prevent the ſame inconveniencies from recurring, it is neceſſary, for the future, to put a ſtop to that enormous multitude of advocates, who, for want of buſineſs, were always ready to undertake the worſt cauſes, and endeavoured to excite and foment diviſions, from which they might reap advantage. For that purpoſe, therefore, the number of advocates in every court of juſtice is fixed: and it is decreed by the new regulation, that the candidate ſhall, for the future, be thoroughly examined upon the law and the ordinances *, and that they ſhall be licenſed for their employment, both by that examination and by various other trials of their capacity.

XIX. *Labour of the advocates rated, and their payment deferred till the end of the proceſs.*

In the third place, as formerly the fee of advocates was not determined, either as to the ſum or the term of payment, and that the more a cauſe was ſpun out, the more did they continually fleece the clients; the new plan prevents all thoſe abuſes, by determining by a ſentence in every inſtance the fee of the advocates, moderated according to their labour, and in proportion to the nature of the affairs, the object of the controverſy, and the fortune of the parties. Advocates are likewiſe prohibited to take one penny before the cauſe be terminated, and they have thereby the ſame intereſt as the parties to ſee it brought to a concluſion.

* The common and ſtatute law.

XX.

XX. *Advocates ſuppreſſed in ſmall places.*

All that we have ſaid (§ 15. and 16.) to prove the neceſſity of advocates, relates however only to great towns and conſiderable tribunals. So far are thoſe reflections from being applicable to little towns, burghs, or villages, that, on the contrary, it is a very great grievance that there are advocates in thoſe places, and that they find employment there. It is rare that proceſſes of any importance have their beginning there. The parties are on the ſpot, the judge is very little employed, and every cauſe may be ſummarily terminated. Nothing is more neceſſary for the happineſs of the inhabitants of ſuch places, than to ſee a ſpeedy concluſion of their cauſes. Their fortunes could not uſually be able to bear the expenſes of a long proſecution; but, above all, their quiet is much more diſturbed by them than in great towns, becauſe the objects of their diſputes are continually before their eyes, and becauſe, ſhut up with them within the narrow limits of their reſidence, they have every moment opportunities of falling out, and of exaſperating their hatred. One judge then is ſufficient in thoſe little places, but it is abſolutely neceſſary that he have a degree of capacity ſuitable to the nature of thoſe affairs, joined with a mind perfectly uncorrupt.

XXI. *Regulation begun in the tribunals.*

Before proceeding to this meaſure in particulars, the king began the regulation in the ſuperior judicatories, or tribunals. The reaſon of this is obvious. The importance of the cauſes which come before thoſe tribunals, required them to be the firſt object of attention. Beſides, as the inferior judicatories depend on the ſuperior which have an inſpection over them, to remedy the defects of the latter is a great ſtep with reſpect to the others.

XXII. *Neceſſity of ſuperior courts.*

It is not an impertinent digreſſion, to reflect a moment on the neceſſity of ſocieties of judicature, or ſuperior tribunals. Such as are not well acquainted with mankind, might eaſily ſuppoſe, that the deciſion of the inferior judge is ſufficient, and that there is no more effectual method for ſhortening law-ſuits, than to be limited to that ſentence. But when it is conſidered how rare it is to find ſuch a judge, poſſeſſed of a capacity ſufficiently extenſive to enable him to determine judiciouſly in the infinite variety of caſes which may occur; and that, beſides all the prudence and all the integrity of a man, through whoſe hands a continual ſeries of buſineſs paſſes, cannot prevent him from falling ſometimes into a miſtake: upon theſe conſiderations it is eaſily perceptible, that it ought to be allowable to bring before a higher court, or to advocate, certain cauſes, and get the firſt ſentence reviſed. And as, after all, unjuſt judges are but too common, it is abſolutely neceſſary to keep them within bounds by the fear of being mortified, in caſe their decree be reverſed, and even being made anſwerable for it in certain caſes. Were it not for that, moſt inferior judges would, in a little time, become petty tyrants.

XXIII. *What an appeal is.*

An appeal is then a remedy allowed by the laws, to parties, in order to procure an alteration or redreſs, from the ſuperior judges, of a ſentence which is reckoned unjuſt. But this remedy might become worſe than the diſeaſe, if it ſerved only to defer to perpetuity the deciſion of cauſes, and to keep the party having the right on his ſide in perpetual uncertainty about the enjoyment of that right. Wherefore the method by appeal muſt be liable to certain limitations, and muſt be circumſcribed by what is called a *fatale*, a laſt

a laſt peremptory term. And as perſons accuſtomed to little towns and villages are very ignorant in point of procedure, and that it would be very prejudicial to them to let ſlip the term preſcribed for the appeal, the inferior judge ought to explain it to them in a diſtinct and poſitive manner, and to obviate every occaſion of doubt on that head; to give them notice of it on the foot of their ſentence in the manner preſcribed, afterward to receive the writ of appeal, and cauſe it to be intimated to the adverſe party, that he may not require an execution of the ſentence, the effect of which is ſuſpended by the appeal.

XXIV. *Caſes in which an appeal is not competent, or at leaſt does not ſuſpend the execution of the ſentence.*

There are however many caſes in which the nature of the affairs leaves no room for an appeal, at leaſt a proviſional execution of the ſentence is required. Common ſenſe points out thoſe caſes. Such are thoſe in which there might be ſome danger in a delay, in which witneſſes are to be examined, reſerving to the adverſe party to make his objections againſt them, in which coſts of ſuit are to be paid according to the rates, and in general in all ſmall matters. Neither can an execution be deferred in any affairs relating to bills of exchange, without which rigour commerce could not be ſupported. Our deſign does not permit to deſcend to further particulars, on which the ordinances may be conſulted.

XXV. *Conſequence of an appeal.*

The appeal being brought before the ſuperior judge, the appellant ought to have a determinate time to profit of that ſtep, and to deduce his right, or ſtate his caſe, in the manner which he thinks moſt advantageous for him. For that purpoſe a ſpace of four weeks

weeks is allowed to him. It might perhaps appear too ſhort, if the appellant himſelf were bound to produce the writings neceſſary in the proſecution of his buſineſs, or if he were to be at expenſe, by having recourſe to an advocate, to get copies made of all thoſe writings. All this is prevented by an injunction to the inferior judge to ſend immediately after the appeal, and without any ſpecial order, all the acts and records to the ſuperior tribunal; ſo that, with that aſſiſtance, the four weeks above mentioned are very ſufficient for reviſing the affair, and pronouncing a new ſentence. The ſame acts often evidently ſhow, that the grievances complained of and repreſented by the appellant to the ſuperior court, are devoid of all foundation. In this caſe, as it would be unneceſſary to loſe time, and to be at new charges; the appellant ought immediately to be caſt by a decree, the cauſes of which ſhould be fully related, containing the principal reaſons which directly refute the complaints and grievances repreſented. Thus, the judges on the appeal confirm the firſt ſentence, which they find equitable, without hearing the party who has acquieſced in it, and who, in his pleadings, could have done nothing elſe than ſupport the juſtice of that ſentence. On the contrary, according to the procedure uſual in Germany and France, the ſuperior judges dare not confirm the ſentence, againſt which the appeal is made, before the other party have notice, and be duly ſummoned to be heard. But when the grievances of the appellant have the ſmalleſt foundation, and there remains room for any doubt; or, if the appellant bring to light any facts which had not been ſufficiently diſcuſſed, and if he offer any new proofs, in this caſe the judges on the appeal are injoined to hear the parties.

XXVI. *Times of appearance preſcribed by the ordinance.*

In order to eſtabliſh their rights, they produce, within the times preſcribed by the ordinance, their writings, which are called a *deduction* *, *exception* or *objection*, *reply*, and *duply* or *rejoinder*. This diviſion is founded in reaſon. There may eaſily be found in the firſt anſwer, exception or objection, pleas or allegations, upon which the judge is not in a condition to give ſentence before hearing the reply of the demandant; and the latter getting by that means a right of proceeding twice to the eſtabliſhment of his demand or claim, natural equity requires, that the defendant have alſo the privilege of a double defence or duply. But it is eaſily perceptible, that thoſe allegations and objections muſt be limited, and that every thing beyond the above-mentioned terms or days of hearing † ſerves only to lengthen, and uſually to embroil procedure.

XXVII. *Inſtances* ‡.

It was no leſs neceſſary to determine, as the King has done, the inſtances or different ways of procedure. Three inſtances are ſufficient for the ſolid diſcuſſion of controvertible affairs, of whatever kind they be. In order to prevent the incidents which put a ſtop to deciſions, advocates are ſtrictly injoined not to undertake any cauſe, nor to begin any proceſs, before getting from their clients all the information neceſſary for ſetting the matter in a true light, and enabling the judges to give a juſt deciſion. If, notwithſtanding

* Claim, demand, libel, bill, charge, or indictment.

† According to the Engliſh law, there are in each of the four term-times four days appointed for giving of judgments, and thus diſtinguiſhed; the eſſoin-day, the day of exceptions, the day of return of writs, and day of appearance.

‡ The inſtance of a cauſe is ſaid to be that judicial proceſs which is made from the conteſtation of a ſuit, even to the time of pronouncing ſentence in the cauſe. *Ayliffe's Parergon.*

thoſe

thoſe precautions, the judges of the firſt inſtance, before whom the proceſs was begun, and even the judges of appeal, have not done juſtice to whom it was due, then the party who thinks himſelf wronged has ſtill the method of reviſal, that is to ſay, the benefit of the third inſtance, to expoſe his grievances, by following the procedure preſcribed for the inſtance of appeal. Both theſe laſt inſtances may be terminated in the ſpace of ſix months, and often much ſooner, by a decree pronounced upon a thorough knowledge of the matter, confirming the preceding, or elſe changing and reforming it, for the reaſons of fact or law inſerted in the decree, or added to it, when they require an ample diſcuſſion *. If it be objected, that, notwithſtanding all this, the counſellors, ſerjeants at law, or magiſtrates of the court or tribunal where the final ſentence is given, however capable and expert they be, may ſtill miſtake, and do wrong to one of the parties, and that therefore it is hard to deprive him of any means of getting that wrong redreſſed; it is eaſy to anſwer, that the difficulty will always ſubſiſt were the number of inſtances to be augmented to infinity;

* Let us here add a remark which may fully ſhow how far exactneſs has been carried. It ſometimes happens, that a party has gained the cauſe in the two firſt inſtances, ſo that he has for him two conſiſtent and conformable ſentences or decrees; that is to ſay, that the decree given in the ſecond inſtance, confirms, to all intents and purpoſes, the judgment paſſed in the firſt inſtance. In that caſe the preſumption is on the ſide of the party who has twice caſt his adverſary. If the adverſe party have recourſe to the third and laſt inſtance, and if the two reporters named give their judgment that that party is in the right, and that ſo there is occaſion to rectify the two preceding ſentences or conformable decrees, then every member of the tribunal muſt give his judgment ſeparately, and that all, without mutually communicating their opinions, ſhould ſend each his own to the preſident, that, after reckoning the votes, and diſcuſſing anew the affair in the aſſembly, there may be given, agreeable to the plurality of voices, a decree, of which the motives are fully explained, to refute the reaſons contained in the preceding judgments.

that

that is to ſay, were proceſſes perpetuated. Are any precautions capable of preventing a juſt right from being injured? That would be as much as to ſay, that methods have been invented to free mankind from all their imperfections. Plans of the nature of this anſwer their end when they put things on the beſt footing poſſible, taking men as they are. Let us conclude then, to return to our ſubject, that the number of three inſtances ought to be in ſome ſort ſacred, and that the ſovereign ſhould not in juſtice add to them any more, or name further commiſſions, under pretext of giving a prerogative or pre-eminence to ſome perſons. Any infraction of the laws is extremely dangerous, and the prince who permits it gives his ſubjects a juſt cauſe of diffidence. When laws are to be eſtabliſhed, there cannot be too great care taken to render them ſuitable to the happineſs of the people; but when once they are in force, the damage that certain private perſons may ſuffer from them, in ſome very rare caſes, is not a ſufficient reaſon for altering the rule, and violating the law. Theſe particular perſons themſelves, were they guided by reaſon, would agree, that they are in the circumſtance of making a ſacrifice for the public good, which ought always to have the preference over their own private intereſt. It is with them as with the apparent irregularities of nature. They are exceptions neceſſarily ariſing from the wiſe laws upon which God regulates the government of the world, and nobody can without folly pretend that God ſhould work miracles to extricate him out of the caſes in which thoſe exceptions turn to his diſadvantage.

XXVIII. *Conſtitution of the ſuperior tribunals.*

The ſubject of appeals being connected with that of tribunals, which we have begun, (§ 26. and 27.), let us continue to explain the conſtitution of thoſe

tribunals. It is a ſubject of the utmoſt importance. They are uſually compoſed of a chief or preſident, and a certain number of counſellors, ſerjeants at law, ordinary judges or aſſeſſors. There is beſides this the chancery, of which this is not the place to ſpeak. The preſident has the inſpection over all the other members of the tribunal, and in concert with them is regulated every thing within the juriſdiction of that tribunal. The ordinary judges are in duty bound to undertake the labour preſcribed to them by the preſident. Their common aim is, that juſtice be done without reſpect of perſons, and without loſs of time, in a manner ſtrictly agreeable to the laws and ordinances.

XXIX. *Superior qualifications of the magiſtrates compoſing them.*

It is eaſily underſtood, that the ſuperiority of thoſe tribunals requires a ſuperiority of talents in the perſons compoſing them. They ought to join to an accurate knowledge of laws natural and civil, and to the ability requiſite for applying them in the caſes which occur, pure views, evident intentions of doing juſtice to every one, and indefatigable care and attention. Even order may be expected from them, and a regular conduct of their domeſtic affairs; for a perſon who cannot govern his own houſehold, will not be more ſkilful in governing his fellow-ſubjects; and above all, the confuſion of his own affairs will make him more acceſſible to temptations, more eaſy to be corrupted. This conſideration induced his Majeſty the King of Pruſſia to make an ordinance becoming his wiſdom, that any counſellor, whoſe effects ſhall come to a competition, ſhould be turned out of his place *eo ipſo* for that ſingle reaſon.

XXX. *Importance of their functions.*

So exalted a notion cannot be given of the importance

ance of the functions of ſuch as ſit to give judgment in the tribunals. It is the happineſs of every individual that makes a whole family happy, the happineſs of every family which conſtitutes that of a ſociety, of a town, the happineſs of every town which conſtitutes that of the provinces, of the whole ſtate: now, this happineſs conſiſts chiefly in the peaceable enjoyment of the advantages which you have acquired by lawful means. But it is the regularity of the judicatures, the ability, the integrity, the vigilance of the magiſtrates, which are the foundation of that happineſs. Thence ariſes an equality among the ſubjects, which prevents the weaker from becoming the victim of the ſtronger, by placing them in a common dependence upon the laws.

XXXI. *Whence it follows that the prince ought to ſupport them with all his authority.*

Thence this very natural conſequence ariſes, that employments of ſo great importance are to be furniſhed with all the exterior aids which may render them reſpectable, and eſpecially that the ſovereign, in whoſe name juſtice is adminiſtered, ought to ſupport them with all his authority. The office itſelf ought not only to be put on an honourable and diſtinguiſhed footing, but thoſe who exerciſe it ought to have ſuch ſalaries as may procure them reſpect. The moſt excellent things may fall into diſparagement for want of this exterior relief.

XXXII. *Deprivation of unworthy judges.*

The main thing, however, it muſt be owned, is, firſt to clear the courts of juſtice of all members who diſhonour them, and who offend, either from groſs ignorance or malice. Surely it is being too laviſh of our compaſſion to beſtow it on perſons who are deprived for ſuch cauſes, or rather our pity for

their fate is cruelty; ſince the choice is viſibly between the perſonal intereſt of a few very deſpicable perſons and the happineſs of the whole ſociety. It is only after the deprivation of the unworthy judges that this regularity in procedures can be eſtabliſhed, and this beautiful plan enforced, which is the ſubject of our inquiry.

XXXIII. *Functions of the preſident.*

Let there then, if poſſible, be only choice perſons in the tribunals, and let us conſider how matters will then happen in them; that is to ſay, let us continue to explain the new regulation. Firſt, the preſident, who ought to be ſuperior in merit as well as in rank over his aſſeſſors the ordinary judges, is, on the one ſide, to be ſolicitouſly watchful that they perform their duties, and, on the other, very attentive to his own peculiar functions. He muſt, before diſtributing the acts *, himſelf acquire a diſtinct idea of the nature of every proceſs. He muſt not, ſo to ſpeak, loſe ſight of the chancery †, and the advocates, and muſt reviſe every month the acts, to ſee whether affairs be diſcuſſed and forwarded as they ought, and to reclaim thoſe who neglect them by cenſures, or by puniſhments. He muſt receive, without diſtinction, all the repreſentations addreſſed to him; the counſellors of the whole college muſt report thoſe repreſentations at the opening of the ſeſſion, and the reſolutions concerning them muſt likewiſe be taken by the whole college. The preſident, in a word, is, as it were, the ſoul of the body; it is he who, by directing every

* Judicial acts are all thoſe matters which relate to judicial proceedings; and being reduced into writing by a public notary, are recorded by the authority of the judge. *Ayliffe's Parergon juris canonici.*

† Perhaps ſomewhat like the clerks of courts, and their offices, or the ſignet-office in Scotland.

thing

thing agreeably to the laws, is to ſet the whole body to work, and regulate its action.

XXXIV. *Detail of procedures very much ſhortened.*

The counſellors are obliged to ſecond and aſſiſt the preſident, and for that purpoſe their aſſiduity is ſpecially requiſite. None is to abſent himſelf on ſlight and arbitrary reaſons. As the counſellor who reports a cauſe is henceforth to be anſwerable for it, it is eaſily underſtood, that he is, from that motive, ſufficiently induced to beſtow upon it all his attention. The other parts of the counſellors duty is ſufficiently known; and as they exerciſe the function of judges jointly with the preſident, that agrees with the ideas which we have already explained.

XXV. *Functions of the counſellers, ordinary judges, or aſſeſſors.*

We join under one article ſeveral things ſettled by the new ordinance, which are of infinite ſervice in abridging the detail of procedures. One of the chief things conſiſts in the method preſcribed for making, by word of mouth, all the remonſtrances and acts requiſite for preparing a law-ſuit. Advocates, when they undertake cauſes, are to be furniſhed with mandates from their clients. They alone are bound to prepare the cauſe, and to appear on the days of audience of the court of judicature in which they are eſtabliſhed. Before the pleading, they, or ſuch as are ſubſtituted in their place, when they cannot be preſent themſelves, preſent their documents and performances, in writing of which the original is added to the judicial acts, and the copy immediately delivered to the adverſe party's advocate. They demand the terms or diets, according to the exigency of the caſes, and make any other requeſt which is proper for preparing the cauſe, inſtead of the requeſts or petitions, ſummonſes,

ſummonſes, interpellations, and other acts in writing, which were formerly made in the courſe of the proceſs. Upon which, and after briefly hearing the advocate of the other party, the judge, on the protocol, minute, or precedent, made on that ſubject, gives a decree which is openly declared, and publiſhed at the following hearing. If any incident happen which cannot immediately be decided, the advocates are referred to the other chamber to be more amply pled and conteſted. The warrants are, in conſequence, delivered at the rolls or regiſter, or at the chancery; and this ſaves all the time and expenſe which it coſts to the parties, to draw up the requeſts or petitions, and to get the decrees, ſummonſes, and other acts, notified. Another important precaution is, that no repreſentation be received, unleſs it be ſigned by an advocate. For it is the advocate's buſineſs to ſign none that are irregular, and to draw the memorial himſelf, according to the tenor of the ordinance, for neglect of which he is immediately fined. If any obſtinate client will proceed, and neglect thoſe forms, he muſt be left to his own hazard; or, if the advocate aſſiſt his client, he is to take a declaration, expreſſing how he would have diſſuaded him from puſhing the affair in queſtion, and repreſented the conſequences of ſo doing, which then reflect upon the client. And that it may appear that no complainer is abandoned, and deſtitute of aſſiſtance, the advocate is to explain to the perſons making ſuch complaints, the reaſons which induce the court to pay no regard to their grievances. Beſides this there is a ſeparate advocate appointed for the poor. Can it eſcape attention how ſalutary thoſe regulations are, and how ſerviceable, both for abridging of law-ſuits, and for clearing them of the miſchiefs conſequent upon them?

XXXVI.

XXXVI. *Proctors, procurators, or agents, abrogated.*

The procurators formerly collected the informations or charge, and were intruſted with almoſt the whole management of the ſuit. The new ordinance enacts, that advocates only ſhould attend to thoſe functions, and by that means, diſburdening the clients of a very great expenſe, abrogate irretrieveably the office of procurators, and rid the ſociety of a very noxious vermine. It is then henceforth the advocates buſineſs carefully to inform themſelves of all the circumſtances before commencing the ſuit. They ought to be thoroughly informed of the proofs before moving the complaint; collect the written documents, inſtruments, or inſtructions, and, in general, provide and produce every thing that may effectually and ſolidly prepare, and ſpeedily terminate cauſes. It is eaſy, after this, to frame a notion of the poſſibility of proſecuting law-ſuits without any interruption, and bringing them at once to a concluſion. For when the advocates, on undertaking the cauſe, are poſſeſſed of all the informations, they may immediately proceed to the proof. There are certain times appointed for that purpoſe, on pain of loſing the cauſe, and the reaſons of that are the ſame as we have explained in ſpeaking of the terms of an appeal.

XXXVII. *Whether or not abſent parties can ſuffer from thoſe regulations.*

It will undoubtedly be objected, that this readineſs of diſpatch will be very prejudicial to the abſent, and to all perſons hindered by lawful impediments, ſince it will deprive them of the time and opportunity of regularly ſtating their caſe, or deducing their right. But this difficulty is already obviated with regard to the demandant, ſince it is requiſite, as has juſt been ſeen, that the cauſe be fully prepared before it be brought into court,

that

that he is at full liberty to take all the time neceſſary for preparing it, and that the advocate himſelf is not to undertake it till he ſee it in a condition of being puſhed and determined within the ſpace of time preſcribed; and as to the defendant, it is extremely rare that he can ſuffer from the above-mentioned regulations. Let us ſuppoſe, for example, that an abſent officer, or any other perſon lawfully hindered, were attacked; it is determined that the defendant may firſt expoſe his hinderances, and demand a term or diet, in order to have time for collecting his reaſons of defence; which ſhall be granted him as ſhall be thought ſuitable to his circumſtances, and that the procedure ſhall not be begun till after that term or diet be expired. It is not in the power of man better to provide againſt all events.

XXXVIII. *A time determined for reports.*

One of the greateſt abuſes in tribunals was the dilatorineſs of counſellors in making reports, which frequently lingers with them ſeveral months. That has been remedied. There is no report but muſt be diſpatched in eight, or at moſt in fifteen days, according as it contains more or leſs work; and if it were, in certain caſes, abſolutely neceſſary to exceed that ſpace, it could only be after producing the proofs of that neceſſity to the preſident. Thoſe who ſay it is impoſſible to execute that regulation, and that cauſes muſt acquire a certain maturity, expreſs themſelves with very little accuracy. For what is the maturity of a cauſe but its full and ſolid preparation; and has not experience juſt given examples by thouſands, that that preparation may eaſily be perfected in the ſpace of time allotted for it?

XXXIX. *Sending acts to the univerſities abrogated.*

A very ſingular cuſtom prevailed in law-ſuits, which however

however rarely failed of being uſed in all cauſes of conſiderable value, which was the ſending to the univerſities the acts of a prepared proceſs, in order to be decided. Poor parties uſually fared very ill by ſo doing. Beſides, a profeſſor who had no practice in law, or the rules of court, who had never ſat in any tribunal, and who was not even acquainted with the cuſtoms of the country, received the moſt complicated and intricate cauſes to unravel and decide. Suppoſe him capable to give ſolutions of the queſtions in equity, and explications of the laws, many other things are neceſſary for pronouncing a ſentence, and, as circumſtances vary infinitely, the unravelling of thoſe circumſtances requires ſome degrees of attention and patience, which thoſe profeſſors were not in a condition to beſtow upon them. And indeed experience proved that thoſe univerſity-deciſions ended only in exceſſive and fruitleſs delays. The acts ſometimes remained abſent months, and even years, and, when it was a foreign univerſity, there were no methods of compelling it to determine, and to return the acts. And indeed the King, fully informed of thoſe abuſes, had already, two years before, aboliſhed a cuſtom ſo prejudicial. The rock intended to be ſhunned by carrying cauſes from tribunal to tribunal, namely, of falling twice into the hands of the ſame judge, is ſufficiently avoided by the methods of appeal above mentioned. I do not think it is pretended that any oppreſſion is to be dreaded from the Great; becauſe the ſuperior tribunal gives its judgment in the ſame diſtrict in which the cauſe was firſt tried. It is not under the government of a juſt and powerful monarch, in whoſe eyes all his ſubjects are equal, that we need to dread ſeeing juſtice ſo wreſted. And if the King had other notions, where ſhould we find means to prevent injuſtices?

XL. *Stated rule of appeals and inſtances.*

Nothing then certainly is better regulated than the appeals and inſtances. You appeal firſt from the inferior to the ſuperior judicatory, who ſometimes diſpatches you in four weeks time. Theſe are two inſtances. The third is by appeal to the tribunal; and, to prevent cauſes from being protracted there, the wiſe precaution has been taken that proceſſes depending at this laſt inſtance ſhould be previouſly prepared, and that, after the parties ſhould eſtabliſh their facts, the acts ſhould be ſent to the examination of the tribunal, to give a final decree without further appeal.

PREFACE.

THough the King, by the publication of the Frederician Code, drawn up according to the plan which he himſelf had given for the reformation of judicial proceedings, has happily attained the ſalutary end which he propoſed to himſelf, of preſcribing one complete procedure, which, being exactly obſerved by the courts of judicature, brings to a determination all ſuits in the ſpace of one year, reckoning from the day of litiſconteſtation, or the firſt pleading of the cauſe: as, notwithſtanding, it has happened, that ſuits, inſtead of being diminiſhed, are, on the contrary, increaſed, from the facility which the parties have found in procuring juſtice, without great charges: this has occaſioned his Majeſty, whoſe knowledge is equally profound and certain, to inquire into the riſe of law-ſuits, and the means not only of ſhortening, but even of preventing them.

§ 1.

Reaſon and experience prove, that ſuits principally ariſe from the uncertainty of laws; one certain law then muſt be eſtabliſhed, which, by laying down ſolid principles, may be applied to all the caſes that occur.

§ 2.

It is truly ſurpriſing, that neither the Romans, who were as remarkable for their taſte in the ſciences, as for their ſkill in arms, nor the German emperors, have thought of cauſing to be compiled and publiſhed one certain law; that is to ſay, a body of law reduced into a ſyſtem, containing the whole of juriſprudence,

ranged in the moſt natural and convenient order, with the general principles on every ſubject, and the conſequences flowing from them.

§ 3.

It is a known fact, that, in the time of her firſt kings, Rome enjoyed no certain law; the arbitrary deciſions of the ſovereign conſtituted the laws, which were collected into one volume by *Papirius*.

§ 4.

The Roman republic, after having expelled her kings, aboliſhed all the laws which they had enacted, and remained twenty years without laws. Afterwards the law of the Twelve Tables, which ſhe brought from Greece, not being ſufficient to ſtand for an univerſal law, two magiſtrates called *duumvirs*, and afterwards the college of pontiffs, got authority to interpret that law. This college deputed every year one of its own members to inſtruct the parties in the method of intenting their actions, and that order ſubſiſted for near an hundred years.

At the ſame time, ſeveral private perſons, of experience in judicial proceedings, took upon them to interpret the laws, and to give anſwers to the parties who conſulted them; that is to ſay, they gave them advice, and directed them in the proſecution of their ſuits. New laws were alſo made on occaſion of the new caſes which occurred. Thoſe which the ſenate made with the approbation of the people, were peculiarly called *laws*: thoſe which the ediles enacted, were called *ædilitia edicta*: thoſe of the people, *plebiſcita*; and thoſe of the prætors, *edicta prætoria*.

§ 5.

From this vaſt number of laws of all kinds nothing could reſult but the utmoſt uncertainty what was law. This ſuggeſted to the celebrated Cicero the thought

thought of drawing up from that immenſe number of laws, one rational and connected ſyſtem, as Aulus Gellius informs us; but that deſign was never executed.

§ 6.

Julius Cæſar was very ſenſible of this confuſion of the Roman laws: he particularly obſerved, that the anſwers of the lawyers, which were eſteemed as ſo many oracles, were the chief cauſe of this confuſion, every one taking upon himſelf to give anſwers; wherefore he took from private perſons all authority to give anſwers on law-ſubjects: a circumſtance which is related by Cicero.

He formed, at the ſame time, a deſign to arrange the laws, confuſedly diſperſed, into a better order, and to compoſe out of them one general and complete ſyſtem; but his untimely death did not allow him to accompliſh his ſcheme. No more is neceſſary for ſhewing that Cicero unjuſtly blames Cæſar for having diſcharged thoſe interpretations, which were very hurtful to the republic.

§ 7.

The uncertainty of law increaſed under the Emperors who ſucceeded Julius Cæſar. Auguſtus found himſelf obliged to reſtore to the lawyers the liberty of giving anſwers. For there was no general rule teaching to judge of the goodneſs or badneſs of a cauſe, and pointing out what action ought to be intented, and how to proceed in it.

Auguſtus had, nevertheleſs, the precaution to reſtrain that liberty, and granted it only to confeſſedly learned men, in which he was imitated by his ſucceſſors.

§ 8.

The ſenate, to which had been left the ſhadow of that authority which it enjoyed in the time of the commonwealth,

commonwealth, publiſhed every day new laws. They were followed by a deluge of imperial conſtitutions, of which Hermogenes and Gregory made two collections. The lawyers alſo continued to give their anſwers, which were eſteemed as ſo many laws; ſo that, under the firſt emperors the confuſion increaſed ſo much, that it was not poſſible to draw from this multiplicity of laws materials for forming a ſcheme of a ſyſtem of juriſprudence.

§ 9.

Adrian wanted to remedy theſe inconveniencies, and cauſed to be collected into one volume, by the lawyer Salvius Julianus, all the edicts of the prætors moſt eſteemed for their equity, and ranged them under different titles, compriſed in ſeveral books, to which he gave the name of *The perpetual edict*.

But, 1.) As this was a ſimple collection of thoſe edicts; 2.) As no order was obſerved in the titles and books, the ſubjects being there confuſedly collected; 3.) As the general principles on every ſubject were not determined; and, 4.) As, beſides the preceding laws, the edicts, the decrees of the ſenate, the anſwers of the lawyers, and the imperial conſtitutions, remained in force, the uncertainty of law was always the ſame.

§ 10.

After the death of Adrian, juriſprudence became ſtill more uncertain: what contributed to this was, that the lawyers of that time, and eſpecially Pomponius, Calliſtratus, Paulus, Ulpianus, and Caius, begun to make commentaries upon the Perpetual Edict, giving to it, at their pleaſure, explications, limitations, amplifications, and exceptions; and, beſides, not being agreed among themſelves, the deciſion of cauſes depended chiefly on the good-will of the judges.

§ 11.

§ 11.

Theodoſius the younger took another method, but which appeared ridiculous to all men of ſenſe. He publiſhed an edict by which he gave the ſtrength of a law only to certain books of the ancient lawyers, ordering that uſe ſhould be made of none but of thoſe of Ulpianus, of Paulus, of Caius, and of Papinianus: moreover, he ordered, that, in caſes where they were not of the ſame opinion, the majority ſhould be followed; that the deciſions of Papinianus ſhould be preferred to the ſentiments of all the reſt.

The ſame Theodoſius collected all the conſtitutions of the Chriſtian emperors, and compriſed them in ſeveral titles and books. This code of Theodoſius was very much eſteemed for a long time in the Eaſt. The learned Godefroi has given an edition of it, with the addition of his own remarks.

§ 12.

But that ſurely was not a way to eſtabliſh one certain law. The books of thoſe lawyers were very far from forming a complete ſyſtem; neither did they ſettle general principles, applicable to particular caſes. What a trouble muſt it have been to run over all thoſe books in every caſe, to diſcover the majority?

The Theodoſian Code being alſo but a collection of imperial conſtitutions, which decided particular caſes, had the ſame defects as the perpetual edict.

§ 13.

Thus, till the time of Juſtinian, the Romans lived inconteſtably in a great uncertainty with regard to law. That Emperor juſtly complains of this, and affirms, that, for the thirteen centuries which had paſſed from the foundation of the empire, till his own reign, the Romans never had one certain eſtabliſhed law.

§ 14.

§ 14.

And indeed that emperor took the reformation of the judicatories much to heart.

1.) He cauſed to be collected into one volume all the imperial conſtitutions included in the three codes, namely, the *Gregorian*, the *Hermogenian*, and the *Theodoſian*, and added his own to them. The whole was publiſhed under the title of the *Reviſed Code of Juſtinian*, and under that of the *Novels*.

2.) But, as thoſe conſtitutions decided only particular caſes, and conſequently were not ſufficient to form one common law, he cauſed extracts to be made from the books of the old lawyers, which, he ſays, were to the number of two thouſand volumes, and had them arranged under different titles, in fifty books, which he called *Digeſts* or *Pandects*, becauſe the whole ſubject of juriſprudence is comprehended and put in order in them. It cannot be denied but that book contains an inexhauſtible treaſure of juriſprudence, and includes all the matter neceſſary to form one common and univerſal law. That work deſerves the greater eſteem, that the ancient lawyers, to decide particular caſes, had no other rule but reaſon and common ſenſe; ſo that it may truly be ſaid that collection contains all the law of nature, as far as it concerns civil ſocieties.

§ 15.

Law however was never more uncertain than it was after that period. If Juſtinian, inſtead of getting all thoſe extracts collected, had ordered one good ſyſtem of law to be compiled; had he cauſed the ſubjects to be arranged in conformity to the three objects of law, as he has done in his Inſtitutions, and had the general principles on each ſubject been determined, one might have had a notion of juriſprudence, and might have hoped to get one certain and unchangeable law.

But

But Juſtinian having ſuffered the ſame defects to ſubſiſt, which before had rendered law uncertain, it ſtill remained ſuch in ſucceeding times.

Indeed, by glancing over the body of Roman law, one may be convinced, 1.) That thoſe who compiled it have not framed a ſyſtem; 2.) That they have not given the firſt place to the general principles; 3.) That they have not drawn the conſequences from them in the moſt natural order: but, 4.) That they have been ſatisfied with making ſimple extracts from the two thouſand volumes above mentioned; and, 5.) That thoſe extracts are very often mutilated; and, 6.) Even contradictory. 7. They have placed the ſubjects ſo confuſedly, 8.) As well as the books and titles of that body of law, that it was not poſſible to deduce from it one general and common law; ſo much the more, 9.) That ſome titles have been inſerted in it which treat of nothing but the forms of proceedings; and that thereby the connection of the law-ſubjects is interrupted. Thence it follows, that, in order to give a well-founded legal deciſion, a judge muſt have got by heart all the extracts, and have a memory ſufficiently retentive to recollect, in every cauſe, the article of the law on which his deciſion was to be founded.

§ 16.

What Juſtinian writes to the ſenate may then be regarded as a real Grecian rodomontade, that he had undertaken a thing, which indeed his predeceſſors had in their thoughts, but which they had never been able to execute; a thing which there was no reaſon to expect, and which all mankind regarded as impoſſible, and above the ſtrength of human underſtanding: as if it had been ſo great a matter, for five or ſix able lawyers, in the ſpace of three years, to make an extract from two thouſand volumes. What we have remarked of the defects of this body of law,

was the cauſe of its being in ſo ſmall eſtimation in ſome nations, that they forbade, under pain of death, to uſe it; as the hiſtorians of Spain, Sweden, and Denmark, teſtify. See *Ludewig in different. jur. Rom. et Germ. op. I. in introitu*, § 3.

§ 17.

The Romans never then had one certain law; which may likewiſe be ſaid of the empire of Germany, down to our own times.

§ 18.

Indeed before the Roman law was received in Germany (which happened in the thirteenth century), every ſtate had its own laws, which were collected by Lindenbrog, Goldaſt, Baluze, &c. and of which ſome veſtiges may be ſeen in the collections of the Saxon and of the Swabian law, called *Sachſen und Schwaben-Spiegel*; but all thoſe laws were very conciſe, and afforded rules only on a few caſes; beſides, they did not form a ſyſtem, nor eſtabliſh general principles; whence it neceſſarily happened that moſt cauſes were arbitrarily decided.

§ 19.

But when the Roman law was introduced into Italy, and publicly taught, it was, on account of the great number of its decrees, and their equity, likewiſe inſenſibly introduced into Germany, about the end of the thirteenth and beginning of the fourteenth century. The doctors educated in the univerſities in the knowledge of the Roman laws, exerciſed the functions of judges or of advocates, and drew breviates of the caſes according to the Roman law; whence it happened, that Germany, which till then had but one uncertain law, had at that time two laws equally uncertain.

In

In the 13th century the decrees of Pope Gregory, or what is now called the Canon law, were received, which formed a third uncertain law. And as none of thoſe received laws had fixed and certain principles, the advocates had an opportunity of perplexing the laws, and the judges of giving ſentence according to their own pleaſure, and of extorting money from the ſubjects.

§ 20.

This inclined the Emperor Frederic III. to aboliſh, in ſome ſort, the Roman law in Germany, by a reſolution of the empire, in 1441, about fifty years after it had been introduced. For this purpoſe, 1.) He allowed only a certain number of doctors of law, eſtabliſhed in the univerſities, to give anſwers on law-ſubjects; ordering, at the ſame time, their anſwers to be made conformable to the received and approved laws. 2.) He prohibited all other doctors to ſit in the judicatories, and to give counſel to the parties. In fine, 3.) He caſhiered all the advocates, becauſe they perverted the laws at their own pleaſure, and ruined thoſe who were obliged to have proceſſes.

§ 21.

It may eaſily be judged that this reſolution of the empire ſcarcely introduced more certainty into the *juriſprudence* of Germany. The defects of the Roman law, and the contrariety of its ſtatutes to thoſe of Germany, ſubſiſted as before; and the doctors who taught in the univerſities, as well as the judges, being authoriſed to determine what laws had been approved, and what not, all law continued uncertain and arbitrary. Even thoſe arrangements were not of long duration; for Maximilian, ſon of that Emperor, when he eſtabliſhed the chamber of juſtice of the empire, introduced into it, at the ſame time, the Roman law, and ordered that it ſhould be regarded and obſerved

as a written imperial and common law, which was reſolved in the diets of the empire as early as the years 1495 and 1500.

§ 22.

The uncertainty of law found in the collection of the Roman laws had ſtill been tolerable, if Juſtinian's prohibition to make any commentary on that body of law had been obſerved; for the advocates and judges would have been obliged to abide ſolely by the laws, to inquire into their true meaning, and to comprehend better than they have done their ſpirit, and the principle on which they were enacted. In place of that there appeared in Italy, in France, in Spain, and eſpecially in Germany, a multitude of commentators, who, in the explication of the Roman laws, invented ſo many limitations, exceptions, and amplifications, that the advocates had a fine opportunity of eluding their meaning; and indeed they began in their pleadings no longer to cite the laws, but the doctors. The judges likewiſe, inſtead of examining the law, and taking the ſpirit of it, followed the opinion received by moſt of the doctors, which was called *following the common opinion.* The number of commentators being, in ſucceeding times, greatly multiplied, ſo that, in doubtful caſes, there were as many doctors for the affirmative as for the negative, it happened that the advocates cited *the common opinion* againſt *the common opinion*; and as the judges were at liberty to follow the opinion of what doctor they pleaſed, all law remained uncertain and arbitrary. The abuſe went ſo far, that when an advocate could produce in favour of his cauſe an opinion of any doctor in law, neither he nor his client could be condemned in coſts.

§ 23.

This unhappily is ſtill in Germany, even in our days, the caſe of the adminiſtration of juſtice.

1.) All the defects of the confuſed collection of the body

body of Roman law ſubſiſt, as they have been mentioned, § 15.

2.) The confuſion reſulting from the different interpretations given to the laws by the commentators, as well as of the opinions and deciſions of the lawyers, with which the public is every day overcharged, likewiſe ſubſiſt, and render law uncertain and arbitrary.

3.) The contrariety between the Roman law and the German is ſtill the ſame; and ſome modern doctors have only increaſed the confuſion and perplexity, by renewing and ſearching out, from their own authority, and without neceſſity, the laws and ancient cuſtoms of the ſtates of the empire.

§ 24.

There have been in this, and the preceding century, ſeveral learned men, remarkable for their knowledge and probity, who, thoroughly ſenſible of thoſe diſorders, have, for that reaſon, wiſhed that a total reformation in judicial proceedings might be deviſed.

§ 25.

There have even been ſeverals who have publiſhed plans of a new code or body of law.

§ 26.

The German Emperors themſelves have ſeveral times cauſed to be propoſed in the diets of the empire a reformation of judicial proceedings, and demanded of the ſtates to give their opinion of this ſubject: but all the deliberations and reſolutions of the empire have had nothing in view but better to regulate procedures, and to correct ſome abuſes introduced into the courts of juſtice of the empire. There was no intention of forming one general and certain law.

§ 27.

Some ſtates of the empire have indeed cauſed certain bodies

bodies of law to be drawn up, among which thoſe of Saxony, of Magdeburg, of Lunenburg, of Pruſſia, and of Wirtemberg, chiefly deſerve commendation; but none of thoſe codes forms one univerſal law, nor includes all the ſubjects of law. Neither are they reduced into the form of a ſyſtem, nor do they contain general principles on every ſubject. In moſt of them they have reſtricted themſelves to regulate the proceedings, and to decide doubtful caſes, with reſpect to which the doctors were not agreed.

N. B. And this is the reaſon that in all thoſe bodies of law a recourſe to the Roman laws has been ſuffered to continue; ſo that the uncertainty of law ſubſiſts in thoſe countries as before.

§ 28.

His Pruſſian Majeſty, whoſe views are infinitely more extenſive, ſet about this matter in a more ſolid manner. He ordered,

1.) To compile one general law for the country, comprehending all the laws of civil ſociety, ſetting on every ſubject the general principles firſt, in order to deduce the conſequences neceſſarily flowing from them; and thus to form an univerſal ſyſtem, applicable to all the ſtates who take reaſon for the rule and foundation of their laws.

For this purpoſe,

2.) The rational and natural ſyſtem of the ancient lawyers was laid down for a foundation, which Emperor Juſtinian alſo followed in his Inſtitutes; and all the rights and privileges which thoſe who live in civil ſociety can claim, have been deduced, whether thoſe rights ariſe from the condition of the perſons, their right in the things, or from perſonal obligation.

It is certain, that to judge of the matter by the ſole light of reaſon, there is no law which may not be comprehended

comprehended under one of these three objects; and, by the examination of the system itself, any person will be convinced that there is no difference which may not be decided by consequences flowing from that source.

3.) In treating each of those objects of law, certain principles have been established, which reason draws from them. The subjects have been arranged under proper rubrics, and in the most natural order, referring every thing to its own place, so that the whole system is connected like the links of a chain.

4.) The general principles are drawn from the body of the Roman law, because those laws are incontestably founded, for most part, on the law of nature. See above, § 14.

5.) As there are in the body of the Roman law several things relative only to the ancient government of Italy, and of Greece, the King has ordered them to be omitted, and laws only which may be suitable to the constitution of the provinces of Germany, to be inserted in the new code.

6.) From this code have also been expunged the many subtilties and fictions which often occur in the Roman law.

7.) The titles regulating the proceedings, and which, in the body of the Roman law, are often intermixed with the law-subjects, and interrupt their connection, have been referred to the Frederician Code.

8.) This new body of law has been composed in the German language, that all those who have suits may consult it, and judge themselves whether they be well founded in their prosecutions or not.

9.) And that private persons, and especially professors, may have no opportunity to corrupt its laws, by interpretations given on their own authority, the King has prohibited, under severe penalties, commentaries to be made either on the whole law of the country, or

on any part of it. For the ſame reaſon he has prohibited the profeſſors who inſtruct youth, to point out to them, contrary to the expreſſions of the law, not even when they take for its foundation its ſpirit and intention, amplifications, limitations, or exceptions. For the advocates and judges ſhall alone have authority to uſe the purity of the reaſons of a law, the former to cite it in their written pleadings, and the latter to found their deciſions upon it.

Wherefore the profeſſors are to confine themſelves to ſimply teaching the ſyſtem to young people, and inculcating into them the general principles on every ſubject, *&c.* The King has alſo prohibited to cite for the future, in civil cauſes, the authority of the doctors, every one being, in the defence of his rights, to found only upon the new body of law: provided always, that, in regard to the particular cuſtoms of places, they may be cited in proof: as if the queſtion were, for example, what is obſerved with relation to the ſervices of tenants, in the law called in Germany, *Gerade*, &c.

§ 29.

As it is not poſſible to include in this body of law all particular caſes, it is neceſſary to point out a method, which may be uſed to decide all caſes not mentioned: now, the King has ordered to take that which reaſon and the Roman laws themſelves furniſh us.

Reaſon teaches us, that when general principles on every ſubject are eſtabliſhed, they comprehend the caſes to which they are applicable. It is eſpecially the duty of an upright and able judge, to inquire, in the examination of caſes not decided, to what principles they may be referred, and whether the ſpirit of the laws, which was the occaſion of eſtabliſhing the principles, relates to thoſe caſes, and furniſhes a deciſion for them.

Wherefore

Wherefore the Roman laws have declared very juſtly, that we ought not ſo much to abide by the words of a law as by its ſpirit, or the reaſon which gave riſe to it, which is included in the law, and is, ſo to ſpeak, its ſoul.

From this truth two conſequences follow; the firſt, that a judge ſhould give ſentence according to the general law in all the caſes to which he can apply its ſpirit. The ſecond, that when the true and only reaſon for enacting a law no longer ſubſiſts; what is ordered by that law, and the law itſelf, can no longer take place.

An exception to theſe conſequences would be, if the law had expreſſed ſeveral reaſons for its being enacted; or if, in matters where penalties are to be inflicted, there had been particular reaſons for enacting them, ſuch penalties could not be extended to penalties not expreſſed.

That the parties, nor their advocates, may not have a liberty, at their pleaſure, of inventing a parity of reaſon, and, under that pretext, of demanding an interpretation of the law, either from the King himſelf, or from his council; his Majeſty ordains, that, when the parties ſhall think, that, in certain caſes, there is a parity of reaſon, they ſhould give the foundation of their opinion in their written papers, and that the judge ſhould have regard to it, if there be really ſuch a parity of reaſon; and, if any one think himſelf injured, he may have liberty to appeal againſt the decree; but, if the court of juſtice found the caſe doubtful, and was not very certain of the reaſon of the law, it ſhall report the caſe to the department of juſtice, with all that may be ſaid on either ſide, which ſhall give its deciſion, after having aſked the opinion of the perpetual commiſſion, concerning the laws to be obſerved by the King's ſubjects. Care ſhall be

taken every year that this ſort of deciſion may be made public.

§ 30.

From what has been ſaid, it follows, that the King has not in reality aboliſhed the Roman law, but that he has only remedied the confuſion which the compilers of that law have cauſed, by their confuſed extracts from it. Indeed the principles of the law of nature, which were, as it were, hid in the body of the Roman law, and in the extracts mentioned, have been ſought out: they are put at the beginning of each ſubject, and rational concluſions drawn from them. Conſequently the Roman law is reduced into an art and ſyſtem; that is to ſay, it is propoſed in the moſt natural and proper order: ſo that this new body of law may reaſonably be called the law of nature itſelf, in ſo far as concerns private perſons, (*jus naturæ privatum.*)

§ 31.

It is to be obſerved, that we were obliged to continue the moſt of the Latin titles, names, actions, and other terms of art *. The reaſon for doing ſo is, that, on one ſide, the advocates and judges have been ſo well and ſo many years accuſtomed to them, that the terms are, as it were, naturalized; and, on the other, that it would have been very difficult to render them into German, becauſe the property of that language is not to expreſs things in the moſt conciſe manner.

§ 32.

Moreover, the King's intention in cauſing this new body of law to be compoſed, was not to hinder, for the future, leſſons from being given in the univerſities on the compends of the Roman law. For acknowledging its authority, with regard to any matters he may have to ſettle in the empire with his neighbours, and which

* This regards the German edition.

muſt

muſt be proſecuted before the tribunals of the empire, it is proper that the knowledge of that law ſhould be cultivated; ſo much the more that there come foreigners to the univerſities, who incline to ſtudy that law.

§ 33.

In fine, it muſt further be remarked, that the ſubject of the condition of a citizen could not for this time be explained in a manner ſufficiently extenſive; becauſe a regulation is actually compoſing, which is to determine how far the affairs of towns ſhall belong to the cogniſance of the department of judicatories; ſo that that condition will be more fully regulated when this new body of law ſhall be reviſed.

§ 34.

That the order obſerved in the ſubjects of this firſt part of the new body of law may be ſeen at one view, and that they are connected together like the links of a chain, and that it will conſequently be eaſy to form an idea of the whole ſyſtem, here is added the plan or ſummary of the three books of the firſt part, which ſhows their order and connection.

ADVERTISEMENT by the French Tranſlator, who has been chiefly followed in this Engliſh tranſlation.

*AS the tranſlator has endeavoured to be as literal as the genius of the French language would permit, and as the tranſlation was made and reviſed, ſo to ſpeak, under the eye of his Excellency the Lord High Chancellor (of Pruſſia *), we have every reaſon to flatter ourſelves that it will be found exact; more eſpecially that his Excellency did himſelf take the trouble to examine the moſt difficult places, and to give elucidations, which have enabled the tranſlator accurately to render the meaning of his original.*

* Baron Cocceius.

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A

NEW BODY OF LAW.

PLAN or SUMMARY of PART I.

BOOK I.

§ 1. THE ſecond title of the firſt book treats in general of *juriſprudence*, of judicatures, and of the laws which ſhall hereafter be followed in the tribunals of our dominions. (*De juriſprudentia, juſtitia, et legibus.*)

§ 2. In the third title are ſhown the three objects of judicial proceedings and of the laws, which include all the rights and privileges which our ſubjects are to enjoy.

§ 3. The firſt object of law, by which men acquire any privileges, is the condition of men or of perſons, which is a condition or quality of the perſon, to which certain rights are annexed. This condition is of three ſorts, namely, 1. That of liberty; 2. That of a family; and, 3. That of a citizen. See title IV.

§ 4. The condition of liberty is treated in the 5th title. There are ſhown the rights and privileges

which our ſubjects acquire by that condition, according to the preſent conſtitution of the countries under our government.

§ 5. The ſecond condition is that of a citizen. Thoſe who live in a civil ſociety, really enjoy certain rights or privileges, treated of in title VI.

§ 6. What concerns the condition of a family, is laid down in the 7th and following titles; and there is ſhown,

1. What the condition of a family is, and of what perſons a family is compoſed. Title VII.

2. What right the huſband acquires in regard to his wife, and what are the rights of the wife in regard to her huſband. Title VIII.

3. What are the rights and privileges of the father in reſpect to his children. Title IX. There the origin of paternal power is treated; and the means by which it is acquired, are explained. Theſe means are, 1. Lawful marriage; 2. Legitimation; and, 3. Adoption. *Arrogatio et adoptio.*

4. The privileges and effects of paternal power with regard to the children, and the means which deliver them from it, are afterwards treated.

5. An account is given of the rights and privileges which children enjoy with reſpect to their parents; and on this occaſion the ſubject of the childrens *peculium*, or peculiar ſtock, is treated. Art. I.

6. The rights and privileges which a mother ought to enjoy in regard to her children are laid down, and thoſe which are reciprocally due to the children with regard to their mother.

7. In fine, this book is ended, by treating further of the rights and privileges reſulting from the ſtate of a family in favour of the other relations among themſelves.

BOOK

BOOK II.

§ 1. In the firſt book is principally comprehended under the condition of perſons, that of a family; and among the rights derived from that condition, the paternal power has been related; and it is previouſly obſerved, that it is acquired by lawful marriage. That ſubject is to be diſcuſſed in the ſecond book.

§ 2. As marriage is uſually preceded by promiſes of marriage or betrothing, the ſecond title will previouſly treat of promiſes of marriage or betrothings.

§ 3. And in the 3d title, of marriage itſelf, will be ſhewn,

a) How marriage is diſſolved or annulled. Art. I.

b) When ſeparation from bed and board may take place. Art. II.

c) And how far concubinage is allowable. Art. III.

§ 4. As perſons rarely marry without agreeing beforehand on ſome marriage-articles, title IV. treats in general

Of agreements concerning the portion *(de pactis dotalibus)*; and in particular

a) Of the portion and its rights. There is ſhewn, by whom and how the portion is to be repeated, and what expenſes the huſband may deduce from it. Art. I.

b) Of the *Paraphernalia*, and of the goods properly the wife's, called *Receptitia*. Art. II. and III.

c) Of the marriage-donation. Art. IV.

d) Of the jointure. Art. V.

e) Of the preſent made to the wife the day after the marriage, which is called in German *Morgengabe*. Art. VI.

f) Of the ſucceſſion of the huſband and wife, ſo

far as it is regulated by the contract of marriage. Art. VII.

g) Of the portion called *Statutaria:* Art. VIII.

§ 5. It happens alſo pretty frequently, that a father, during his marriage, or after it has been diſſolved, or the agnates or relations by the father's ſide, after his death, will not acknowledge the children as lawful, nor furniſh them the maintenance they need; which gives occaſion to treat, in the 5th title, of acknowledging children, *(de agnoſcendis liberis.)*

And in the 6th title, of the obligation of parents to maintain their own children, *(de alendis liberis.)*

There is ſhewn at the ſame time, in what caſes one is obliged, according to the laws, to give maintenance to others beſides their own children.

§ 6. And as wives, after the death of their huſbands, or after being ſeparated from them, often pretend to be with child, and others, out of hatred to their huſbands, deny their being ſo; the laws grant, in title VII. to thoſe having intereſt, the liberty of taking the neceſſary precautions to make an inquiry into ſuſpected big-bellies. *De inſpiciendo ventre et cuſtodiendo partu*; item, *Si mulier, ventris nomine, in poſſeſſionem calumniæ cauſa miſſa dicatur.*

BOOK III.

§ 1. 2. 3. The firſt book treats of the condition of perſons, and of the rights thence ariſing; and on this occaſion it has been remarked in general, that both the ſtate of a family and that of a citizen demand, that the family and community protect all thoſe who conſtitute a part of them: this is the origin of tutelages or guardianſhips, which are treated in this third book, namely,

§ 4. In title II. of guardianſhips in general.

§ 5.

§ 5. In title III. of the guardianſhip conferred by the father's teſtament, or will.

§ 6. In title IV. of the guardianſhip of the neareſt relations, or neareſt of kin.

§ 7. In the 5th title, of the guardianſhip conferred by the magiſtrate; in which is ſhewn, who is to ſolicit the office of guardian.

§ 8. In title 6. of the adminiſtration of the guardianſhip, and of the pupil's effects; where is mentioned, what a guardian is to obſerve before he acts as guardian, and which conſiſts a) in getting himſelf confirmed in a court of juſtice, b) in giving his oath, c) in giving ſurety, and, d) in making an inventory of the pupil's effects.

There alſo is regulated,

1. How the guardian is to take care of the education of his pupil. Art. I.

2. What he is to obſerve in the adminiſtration of his effects. Art. II.

3. And how the accounts of his adminiſtration are to be received and rendered. Art. III.

§ 9. In the 7th title, the authority and power of guardians in the affairs of their pupils is treated:

§ 10. In title VIII. is ſhown what action a pupil acquires againſt a third party, by the deed of his guardian; and what action the third party obtains againſt a pupil by the deed of his guardian.

§ 11. Title IX. treats of the actions which the pupil has againſt the guardian, and the guardian againſt him.

Art. I. ſpeaks of the action of *guardianſhip direct*, which the pupil has againſt his guardian, to cauſe him give an account of his adminiſtration.

In art. II. is deſcribed the action of *guardianſhip contrary*, which the guardian has againſt the pupil, to obtain the reimburſement of advances made, and the payment of damage ſuſtained by him.

In art. III. is declared, that the ſame actions have

place

place between the pupil and a perſon, who, without having been named guardian, has, nevertheleſs, acted as ſuch, and has *bona fide* adminiſtered the pupil's affairs.

In art. IV. the engagements of the guardian are treated, who falſely and fraudulently paſſed himſelf for a guardian.

Art. V. treats of the heirs of guardians; and there is declared how far the heirs may be proſecuted with regard to the deed of the guardians.

Art. VI. treats of ſureties who have become bound for guardians, and of their engagements.

In art. VII. is ſhewn when the magiſtrate may be proſecuted ſubſidiarily.

§ 12. In title X. are repeated the means by which the guardianſhip comes to a period; and,

§ 13. Among theſe means are the lawful excuſes mentioned in tit. XI.

§ 14. In title XII. is declared, when the guardian may be ſet aſide as ſuſpected; and finally,

§ 15. Tit. XIII. treats of the curators given to minors and other perſons, who are not themſelves in a condition to manage their own affairs.

INTRO-

INTRODUCTION

TO THE

Body of the Municipal Laws of PRUSSIA.

§ 1.

MOST of the laws contained in the body of the Roman law, being founded on natural equity, and the principles of ſound reaſon, it is not ſurpriſing that they have been ſo highly eſteemed, and that moſt Chriſtian nations have made choice of them for their common law, preferably to any other.

§ 2.

Only it would have been very deſirable, that the ſovereigns who have reigned in Germany, had, from the beginning, thought of reducing thoſe laws into the form of a ſyſtem, of explaining any obſcurities, doubts, or even contradictions that occur in them, and finally of excluding all ſubjects which had no relation to the preſent ſtate of Germany.

§ 3.

Inſtead of that, the Roman law was received juſt as it is, namely, compoſed of extracts, often mutilated, and injudiciouſly taken from the writings of ancient lawyers, and beſides containing many laws ſuited only to the ſtate of the Roman republic. This unavoidably produced the various inconveniencies which we are now to ſhew.

§ 4.

§ 4.

(a) Youth were obliged to employ ſeveral years in the ſtudy of the Roman law: for the doctors, in the treatiſes which they publiſhed of it, always kept to the confuſed order of the titles, by which the ſubject was ſo interrupted, that it was very difficult to form an idea of the ſyſtem of the Roman juriſprudence.

(b) Youth were further obliged to employ a great deal of time in the ſtudy of the Roman antiquities, in order perfectly to underſtand the origin of the names of the actions, and of the terms of art, and ſo to become maſters of the hiſtory of law.

(c) But the moſt diſagreeable labour conſiſted in obliging the young people to ſtore their memories with a great number of laws, applicable only to the conſtitution of the Roman empire, and which were of no uſe in Germany; ſo that ſeveral years were loſt in acquiring knowledge which could be of no advantage to them.

(d) And as every judge or doctor, under the pretence of inquiring into the ſpirit of the Roman laws (which moſtly conſiſts in ſimple extracts), took the liberty to explain, reſtrain, and extend them at pleaſure, and often in a very forced manner; it happened at laſt, that, in the whole body of the Roman law, there was ſcarce a ſingle one upon which there had not been diſputes *pro* and *con*; whence enſued arbitrary deciſions and common opinions. The evil came to ſo great a height, that common opinions quite contrary to theſe common opinions were quoted againſt them: which produced a dreadful confuſion, not to ſay a total ſubverſion of the adminiſtration of juſtice.

In fact, experience ſhewed, that the judges were wont to found their judgments, much more on the opinion of the doctors from whom they quoted [illegible] me[illegible]

merous paſſages, then on the laws themſelves and their true ſpirit. This not only rendered all laws arbitrary and extremely uncertain, but alſo expoſed the poor ſubject to exorbitant charges in the proſecution of his juſt claims.

(e) The doctors, in fine, went ſo far as to abrogate laws at their pleaſure, or at leaſt to make them paſs as abrogated; which ſometimes has occaſioned lawyers in a proceſs to confine themſelves to the ſingle queſtion, whether or not a law were ſtill in force.

§ 5.

As the Canon law, before the reformation, had great authority, diſputes often aroſe among the lawyers concerning the caſes in which it ought to prevail over the Roman law; by which means the uncertainty of the laws was further conſiderably increaſed.

§ 6.

Moreover, ſome doctors had taken the liberty, on their own authority, to add to the Roman and Canon laws, which are both ſo uncertain, a German law, which at bottom is only imaginary, ſince nothing certain is known of its origin, and that moſt of theſe German laws being applicable only to the preſent conſtitution, are now alſo long ago in diſuſe; ſo that in place of two laws, Germany had three equally uncertain, introduced by the private authority of ſome lawyers, who wrote huge volumes on this pretended German law, to which they referred in the deciſion of ſuits; and this gave the lawyers a new handle for ſqueezing the parties to the very marrow of their bones.

§ 7.

This confuſion was only increaſed in ſome of our provinces, by the introduction of the Saxon law, which was chiefly followed in the forms of proceed-

ing, though it differs in many caſes from the common law. And, indeed, law-ſuits of great duration have ariſen upon the queſtion, In what caſes the courſe of the Saxon law ſhould be followed, and in what caſes the civil law ſhould be preferred to it?

§ 8.

Further, every province, and almoſt every town, quoted particular ſtatutes, unknown moſtly to the inhabitants; whence aroſe various law-ſuits, for determining whether theſe ſtatutes were ſtill in force, and how far it was neceſſary to comply with them.

§ 9.

Add to all this, the great number of edicts, which muſt neceſſarily embarraſs our ſubjects, who could not poſſibly remember all the particular caſes which were decided in the edicts, and theſe often in a very oppoſite and contradictory manner.

§ 10.

In order to remedy ſo many abuſes, we have cauſed compoſe a body of law for our dominions, founded on certain and rational principles; in which we have indeed taken the Roman law for a foundation, in ſo far as its general principles appeared drawn from natural reaſon; and we have preſerved the names and terms of art, to which ſo many judges, and even the ſubjects are already accuſtomed. But we have excluded all the ſubtilties of the Roman laws, and every thing not applicable to the conſtitution of our dominions. We have eſpecially had it in view, to reduce the whole work to the form of a clear and diſtinct ſyſtem; and we have cauſed publiſh it in the German language, that our ſubjects may themſelves be able to read it, and occaſionally to have recourſe to it. We have introduced into it, under proper rubrics, all the edicts concerning

concerning judicatures, without treating here of thoſe which regard the police, military affairs, and the like.

§ 11.

Our chief attention was to lay down on every ſubject the moſt natural principles, to give clear definitions, and to deduce, in the moſt exact order, the cauſe, the ſubject, the object, the effects, and the means of putting an end to buſineſs; ſo that it will be eaſy to a ſenſible judge to draw the conſequence from them, to apply them to all the caſes which ſhall occur, and, by the ſpirit of the law, to ſupply whatever it ſhall not have expreſsly decided.

PART I. BOOK

TITLE I.

Subject of the First Book.

§ 1.

THE ſecond title treats in general of juriſprudence, of judicatures, and of the laws, according to which judgments are to be pronounced in our dominions.

§ 2.

In the third title are ſhown, the three objects of juſtice, and of the laws, under which are comprehended all the rights and advantages which are due to our ſubjects.

§ 3.

The firſt object of right, with reſpect of which men acquire certain privileges, is the perſonal ſtate; by which is meant, a quality or condition of a perſon, to which certain rights are annexed. This ſtate is of three ſorts: 1.) The ſtate of liberty; 2.) The ſtate of a citizen; 3.) The ſtate of a family. See Title IV.

§ 4.

Title V. treats of the ſtate of liberty; and therein is ſhown, what are the rights and privileges which

our ſubjects acquire by that ſtate, according to the preſent conſtitution of the countries under our government.

§ 5.

The ſecond ſtate of perſons is that of a citizen; certain rights and advantages being granted to thoſe who live in a civil ſociety; they are treated in Title VI.

§ 6.

The family-ſtate is treated in the ſeventh and following titles; where is explained,

1.) What the family-ſtate is, and of what perſons it is compoſed. Title VII.

2.) What are the rights of the huſband with regard to his wife; and what rights the wife ought to enjoy in regard to her huſband. Title VIII.

3.) What are the rights which the father enjoys as ſuch with regard to his own children. Title IX. There alſo is canvaſſed, the ſubject of the origin of paternal power, and the ways by which it is acquired, namely, 1.) lawful marriage, 2.) legitimation, and 3.) adoption.

4.) Afterwards are mentioned, the effects and rights of the paternal power with regard to children, and the ways of being freed from it.

5.) The rights of children with regard to their father are related, together with the ſubject of their *peculium* or peculiar ſtock. Art. I.

6.) The rights of the mother with regard to her children, and thoſe of the children with regard to their mother, are explained.

7. Laſtly, are treated the rights and privileges which relations mutually obtain by the family-ſtate.

TITLE

TITLE II.

Of JURISPRUDENCE, *of* JUSTICE, *and of the* LAWS *in general.*

(De juriſprudentia, juſtitia, et legibus.)

§ 1.

JUriſprudence is nothing elſe but the ſcience which teaches what is juſt and what is not.

§ 2.

Its end is juſtice, which conſiſts in giving every one his own; by which we mean, what our laws acknowledge to be due and to belong to him.

§ 3.

It is proper then to begin with ſhewing what are the laws which will make known to our ſubjects, what is their due, and what belongs to them.

§ 4.

I.) The principal law which, for the future, is to ſerve them for a rule to judge of this, is the preſent body of law, compoſed of principles flowing from the light of reaſon, and of all the beſt things in the civil laws, and in the ordinances and conſtitutions of our dominions; which we order to be kept and obſerved for ever in all our kingdoms, territories, and dominions.

§ 5.

a) For this purpoſe we diſcharge the advocates from quoting hereafter the authority of the Roman law,

law, or that of any doctor whomſoever; and the judges from having regard to them in the deciſion of cauſes; abrogating all other laws, conſtitutions, and edicts, different or contrary to the meaning of the preſent body of law for our dominions.

§ 6.

b) We declare, that no contrary cuſtom, even though it were approved by decrees, having the ſtrength of a deciſion, ſhall at any time prevail againſt the tenor of this body of law; unleſs it ſhould be expreſsly abrogated by a contrary law.

§ 7.

c) We prohibit the judges to interpret it in doubtful caſes, and under pretext of the intention of the law, and of an equity which very often has no foundation but in their own brains, to form, at pleaſure, exceptions, limitations, or amplifications. They are, notwithſtanding, authoriſed to apply and extend the law to all the ſimilar caſes, which the ſpirit and reaſon of the law had in view, though it may not have been poſſible to bring in every particular caſe.

§ 8.

Our will is, that when any point of this body of law ſhall appear to the judges doubtful, and to need an explanation, they ſhould apply to the department for affairs of juſtice, that they may give the neceſſary explanation and ſupplements. Doubts will be thus reſolved, and we will cauſe print and publiſh ſuch deciſions every year. But our will is, nowiſe to allow the parties themſelves to apply to us, under pretext of demanding the interpretation of a doubtful caſe. When that ſhall happen, we will indeed remit the petition to the judge-ordinary, with a reſcript for the adminiſtration of juſtice; but we ordain, that the

lawyer

lawyer who ſigned the petition be fined in five rix-dollars.

The parties who ſhall find any law of this new body doubtful, muſt mention it in their informations or written papers. But if the law appear clear to the judge, and if he find it has no need of an interpretation, it will be ſufficient if he pronounce ſentence according to the dictates of his own conſcience; and the party ſhall be at liberty further to propoſe his doubts, in the following calling, by way of grievance.

§ 9.

e) Our pleaſure likewiſe is, That the judges pay no attention to the reſcripts which ſhall be manifeſtly contrary to the tenor of this body of law; for in giving them, we ſhall always ſuppoſe, that, on the one hand, the repreſentation is founded on truth, and, on the other, that the reſcript is agreeable to the tenor of the body of law. Thus the judges muſt always give ſentence according to the laws, without ſuffering themſelves to be influenced by reſcripts, which may be obtained by a falſe repreſentation, or contrary to the intent of the body of law. In like manner we declare, that whatever ſhall be ordered by ſuch reſcripts, contrary to the preſent ordinance, ſhall have no force in law, and ſhall never be of any avail.

As to the orders which we ſhall give in our council, if the judges think them contrary to the intent of the body of law, they are to make their repreſentation, and to aſk new orders; and whatever thereupon ſhall then be ordained and regulated by us, ſhall be put in execution.

§ 10.

f) We prohibit the making commentaries or diſſertations on the whole body of law, or on any part of it. For moſt commentators, ignorant of the ſpi-

rit and reaſon of the law, only occaſion uſeleſs diſputes.

§ 11.

g) Moreover, the body of law muſt not be uſed in the deciſion of caſes which happened before its publication, unleſs the queſtion were concerning doubtful laws, whoſe difficulties were removed by ſomething certain; ſuch deciſions eſtabliſhed in this code, given upon uncertain laws, falling naturally to be extended to the caſes which happened before.

§ 12.

II.) As our ſubjects of the Catholic religion are, by virtue of the peace of Weſtphalia, to be judged according to their principles in matters of faith, we preſerve the Canon law in its full force, in ſo far as it is neceſſary for that purpoſe. But we abrogate it in all civil affairs, excepting only what concerns the offices and dignities of chapters, with the rights belonging to them; and whatever regards tithes, which we order to be decided according to the Canon law, even among our Proteſtant ſubjects.

§ 13.

III.) Feudal cauſes ſhall be decided according to the Feudal law, and according to our conſtitutions concerning fiefs, till we have cauſed compoſe and publiſh a particular Feudal law.

§ 14.

IV.) As there often happen new circumſtances and new cauſes, which require particular conſtitutions, or at leaſt declarations of the body of law; we will and ordain, that thoſe conſtitutions, declarations, and edicts, which we ſhall afterward give, ſhall likewiſe

have the force of a law, two months after their publication.

§ 15.

V.) Many provinces, cities, and communities, having particular ſtatutes and privileges which they wiſh to preſerve; we ordain, that, within the ſpace of a year, they lay before us all the points of their ſtatutes which differ from the preſent body of law; reſerving to ourſelves to approve them according to the exigence of the caſe, and to cauſe print, and add to our body of law, an appendix, containing the particular rights of every province. But we diſcharge our judges to pay any regard to ſtatutes which have not been remitted for our confirmation within the term of a year as preſcribed.

We declare at the ſame time, that we will ſee with a ſingular ſatisfaction, that our provinces concur on their part to introduce every where one uniform law; that they ſubmit eſpecially to the order of ſucceſſion eſtabliſhed in the preſent ordinance; and that they renounce in this manner, for the future, the community of goods, which is uſually an inexhauſtible ſource of law-ſuits.

§ 16.

VI.) The privileges which, for important reaſons, we grant to private perſons, ſhall have likewiſe, with regard to them, the force of a law.

a) Theſe privileges are granted *, 1. Either with relation to a thing; or, 2. For ſome reaſon or cauſe; or elſe, 3. In favour of a perſon.

§ 17.

b) When theſe privileges have been given with re-

* 1. Rei, 2. cauſæ, 3. perſonæ.

ſpect

ſpect to a thing, they are real, and paſs to heirs, and to every poſſeſſor of the thing.

§ 18.

c) To real privileges, are to be referred thoſe which have been granted for any real cauſe, ſuch as the privileges of juriſdiction, of daughters' portions, and others which paſs likewiſe to heirs.

§ 19.

d) When privileges have been given only in favour of a perſon, they are perſonal, and are not to be extended to heirs or others. We comprehend under theſe perſonal privileges, thoſe which are granted to doctors, to profeſſors, to eccleſiaſtics, to ſoldiers, to minors, to wives, to ſtudents, &c.; as alſo, letters of reſpite, and others, which for that reaſon do not regard the ſureties.

§ 20.

e) If it ſhould be doubtful, whether a privilege has been given in conſideration of a thing, or for a certain cauſe, or in favour of a perſon, it ſhall be reckoned perſonal.

§ 21.

f) When two perſons equally privileged have any difference between themſelves, neither of them may alledge his privilege againſt the other, unleſs the one acts only to avoid 1.) a loſs, and the other, on the contrary, only to make 2.) a gain *.

§ 22.

g) We by no means deſign to grant privileges

* 1. De damno vitando, 2. de lucro captando.

which may derogate from the well-acquired right of a third perſon.

§ 23.

h) We declare, that all privileges are to be interpreted, in as far as regards us, in the moſt extenſive ſenſe of which they ſhall be capable; provided, that thereby neither our ſovereignty, nor the rights of our crown be prejudiced; but our will is, that, with regard to the rights of a third perſon, they be confined to the ſtricteſt ſenſe.

§ 24.

Such privileges as ſhall not turn to the prejudice of the public, nor of a third perſon, ſhall not be revoked by our ſucceſſors, eſpecially if they have been granted in conſideration of ſervices done to the ſtate.

§ 25.

VI.) We will alſo, that, beſides the laws mentioned, a rational cuſtom, and well eſtabliſhed by conſtant uſe, have the ſtrength of a law; but, 1.) This cuſtom muſt have been introduced by acts ſeveral times reiterated, of which there are at leaſt two alike; 2.) Theſe acts muſt have been public; and 3.) They muſt be proved in an evident and inconteſtable manner.

Nevertheleſs, we do not intend that any cuſtom ſhould prevail, if it be notoriouſly contrary to the conſtitution of the ſtate, or to the tenor of this preſent body of law.

§ 26.

In fine, we have reſolved to declare, as we do declare by the preſent ordinance, that our intention is, that law-ſuits which ſhall happen between us and our ſubjects, be decided according to the tenor of this body

body of law; and that we do not claim any prerogative or favour, either in regard to the profecution of the ſuits in which we are concerned, nor in regard to their deciſion; that, on the contrary, we here again ratify what we have ordained in the Frederician code, P. I. T. XIII. and P. IV. T. V.; namely, that in a doubtful caſe, when the matter is of ſmall importance, we chuſe rather to ſuffer ſome loſs, than to weary our faithful ſubjects by burdenſome law-ſuits. Thus, a perſon who is in poſſeſſion of any of our rights of regale, ſhall be ſupported in it; our will being, that the fiſcal ſhould only act for the demandant.

§ 27.

It follows, from what has been laid down as a principle, that juſtice conſiſts ſimply in letting every one enjoy the rights which he hath acquired in virtue of our laws; that the queſtion is here only of particular, and not of univerſal juſtice, under which philoſophers comprehend likewiſe morality, and which have occaſioned ſubtile and unneceſſary diſtinctions, which we have excluded from the preſent body of law; ſuch are the diſtinctions of juſtice into *diſtributive* and *commutative*, and thoſe of proportion into *geometrical* and *arithmetical*. And as the definition which we have given of juſtice, includes all the other rules of right, there is properly but one ſingle general rule of right, namely this, *Give every one his own.*

TITLE

TITLE III.

Of the three objects of JUSTICE.

§ 1.

AS juſtice chiefly conſiſts in giving every one his own, that is to ſay, what belongs to him of right, the queſtion is principally to know, what are the rights acquired by virtue of our laws.

§ 2.

All the rights and privileges which our ſubjects can acquire, flow from theſe three principal ſources.

I.) From the perſonal ſtate, which is a condition or quality of a perſon, to which certain rights and privileges are annexed, and which are not enjoyed by thoſe who have not that quality. This ſhall be treated in this firſt part.

II.) From a right in things; namely, from the acquiſition of the property of a thing, or of ſome other real right; which ſhall be treated in the ſecond part.

III.) From perſonal obligation, that is to ſay, from that lawful engagement which obliges a perſon to do any thing, or to give any thing; which ſhall be the ſubject of the third part.

§ 3.

Theſe are the three objects of right and of all the laws, in virtue of which our ſubjects acquire any right: except theſe, there is nothing which can give a foundation to men for forming claims againſt one another.

§ 4.

§ 4.

When any one then, in conſequence of one or other of theſe objects, ſhall have acquired a right, it is plain, another cannot deprive him of it, nor moleſt him in the enjoyment of that right; and that the magiſtrate ſhall be bound to protect him in it, and to cauſe to be given to every one what belongs to him.

§ 5.

We are now to proceed to the firſt object of right, namely, the perſonal ſtate.

TITLE IV.

Of the firſt object of JUSTICE, *namely, the ſtate of men, or of the rights of perſons.*

§ 1.

THE laws being eſtabliſhed on account of men, it is proper to begin with treating of the firſt object of law; and for this purpoſe, firſt to mention the differences which are to be found between them, and afterwards to ſhow wherein the perſonal ſtate conſiſts, and what rights flow from it.

§ 2.

I. Men are divided into perſons independent, who are not ſubject to the power of another; and into perſons ſubject to the power of another. Thus ſervants are under the power of their maſters, children under that of their father, pupils under that of their guardian, and ſubjects under that of their ſovereign.

§ 3.

§ 3.

II. Mankind are divided into males, females, and hermaphrodites. Divers privileges are granted to the male ſex, as to the moſt excellent. Thus men alone can ſucceed to fiefs, exerciſe public employments, conſtitute a guardian to their children. Women, in like manner, have certain privileges which are granted them in conſideration of the weakneſs of their ſex; they may be ignorant of the law, without being made reſponſible for it; they enjoy the benefit of the *Velleian decree*, &c. Hermaphrodites are ſuch as have the marks of both ſexes: with regard to a hermaphrodite, it muſt be obſerved, that an examination is to be made what ſex is moſt prevalent in ſuch perſon, and to cauſe the perſon be, in conſequence, declared male or female. When neither of the ſexes is more prevalent than the other, the perſon has the choice; but the choice being once made of one ſex, that perſon is prohibited, under ſevere penalties, to uſe the other ſex. Thus, a hermaphrodite, who has once married a man, cannot afterward be married to a woman.

§ 4.

Men are conſidered as born, or to be born. Men born, are ſuch as have come into the world alive. To prove that a child came into the world alive, it is not neceſſary that it give a cry, but it is ſufficient if it had any other token of life; in a doubtful caſe, the child is preſumed to have been in life at the moment of its birth, provided it be born at the time preſcribed by nature for child-bearing.

Monſters, though born alive, are not reckoned in the number of men born. By monſters are underſtood, thoſe creatures who have neither the human form nor underſtanding. We do not intend, however,

ever, that any one may make away with them of his own private authority; the magiſtrate muſt take cogniſance of their condition, and determine their fate.

Men to be born are regarded as already ſo, whenever there is any queſtion concerning their intereſt, and when the deciſion of the affairs in which they are concerned, cannot be delayed till their birth. Conſequently, they enjoy all the rights of thoſe who are born; but it is alſo ſuppoſed, that they ſhall really be born alive, and that they ſhall not be monſters. This foreſight in favour of children to be born, ought to go ſo far, as that things be regulated as if the woman who is with child were pregnant of three children. Thus, when, after the death of the father, the queſtion is to make a diviſion of his ſucceſſion, three portions muſt be reſerved for the children of whom the mother may be delivered. The children who are not yet born, procure alſo ſome advantage to their mother. Thus, a woman, during her pregnancy, cannot be puniſhed corporally, nor baniſhed from a country, if the place of baniſhment be remote, and the time of delivery near.

§ 5.

IV. There are yet other diſtinctions, founded on the age and condition of men, which afford new claſſes; namely, thoſe of perſons of age and under age, of married women, of widows, and of unmarried girls, of gentry and commonalty, of eccleſiaſtics and laics, &c.

§ 6.

All theſe different conditions enjoy certain rights and privileges annexed to their ſtate.

§ 7.

The privileges annexed to theſe different condi-

tions, flow either from the natural ſtate of mankind, or ſolely from the civil laws.

§ 8.

The natural ſtate of mankind is a condition or quality annexed to the perſon as ſuch, and which every one derives from nature.

§ 9.

The natural ſtate of perſons is of three ſorts: 1.) The ſtate of liberty. 2.) The ſtate of a citizen. 3.) The ſtate of a family. For, according to the ſtate of nature, 1.) All men are born free, and are not under the yoke of ſervitude; 2.) They live all in a civil ſociety; and 3.) They are all members of a family.

§ 10.

From theſe three ſtates, which may be called, if you pleaſe, conditions or qualities, naturally flow certain rights which ſhall be treated in the following titles.

§ 11.

And as men derive theſe rights from nature itſelf, they acquire actions, both perſonal and real, againſt any one who would diſturb them in the enjoyment of the privileges annexed to their ſtate. But if the ſtate of a perſon be called in queſtion, and if his liberty, for example, be conteſted, or the quality of a member of a civil ſociety, or that of a member of a family, the queſtion ſhall be decided by the actions which are called *præjudiciales*, or preparatory.

§ 12.

Theſe actions are called prejudicial, becauſe, before one can enjoy the rights and privileges annexed to

to the ſtate of the perſons, it muſt previouſly be decided, if they be in that ſtate.

§ 13.

Theſe actions, then, are nothing elſe, but the power or faculty which every man has to defend his ſtate, that is to ſay, the quality annexed to his perſon, againſt any one who diſputes it with him.

§ 14.

They differ from real actions, which have a real right for their object, and by which the plaintiff proſecutes his rights of property, &c. They differ alſo from perſonal actions, which ſuppoſe an obligation on the perſon, in virtue of which the plaintiff claims that the defender be bound to do a thing, or to give it.

But, in the action called prejudicial, is explained ſimply, ſome one of theſe queſtions: Is the perſon in queſtion free? Is he member of ſuch a civil ſociety? Is he of ſuch, or ſuch a family? Theſe actions affect the perſon himſelf; they ſuppoſe a right which is immediatly annexed to him; and conſequently by theſe actions is neither claimed a real right, nor the fulfilling of an engagement, but the perſon himſelf is attacked, and the ſtate or quality which he aſſumes to himſelf, is diſputed.

§ 15.

By the change of the natural ſtate, that is to ſay, by the loſs of the quality naturally annexed to a perſon, he loſes the rights and privileges annexed to that ſtate.

Thus, he who loſes the ſtate of liberty, that is to ſay, who ceaſes to be a free man, loſes all the privileges annexed to natural liberty.

Thus, he who loſes the ſtate of a citizen, that is to ſay, who ceaſes to be a member of civil ſociety,

loſes the rights and privileges which that ſociety procures to all thoſe of whom it is compoſed. Thus, he who loſes the ſtate of a family, ceaſes to enjoy the rights which belong to the members of that family. In the following titles we ſhall treat of the change of ſtate, and of the manner in which thoſe qualities are now left, according to the preſent conſtitution of the countries under our government.

§ 16.

Beſides the three ſtates juſt mentioned, there are many others, but which have not their origin from the natural ſtate, as they owe their eſtabliſhment only to civil laws, which have granted to ſome perſons, in conſideration of their condition, and of the ſituation in which they are placed, particular rights and privileges.

In fact, nature grants the ſame rights to men and to women, to thoſe of age and thoſe under age, to gentry and commonalty, to married women, to widows, and to girls, &c.; ſo that the rights and privileges which ſome enjoy in preference to others, flow only from civil laws.

§ 17.

Thus a minor does not loſe what is called the perſonal ſtate when he is declared major, or of age, nor a man raiſed to dignity when he is deprived of his office; but they loſe only the rights annexed, by the civil laws, to the condition which they have forfeited.

As theſe rights are aſſigned by the laws to the civil ſtate, that is to ſay, to the condition and quality of the perſon to whom they are immediately annexed, that perſon obtains likewiſe actions, both real and perſonal, againſt thoſe who would deprive him of his rights and privileges.

But,

But, if the ſtate itſelf be conteſted, and, for example, it be denied, that a perſon is minor, noble, a widow, &c. thence to conclude, that he cannot claim the rights annexed to a quality which he has not; the laws grant him, in order to defend his ſtate, the actions called *prejudicatively uſeful*, or *preparatory uſeful actions*, (*actiones præjudiciales utiles.*)

TITLE V.

Of the ſtate of LIBERTY.

§ 1.

THE firſt ſtate which man acquires by nature, is the ſtate of liberty; for naturally all men are free, that is to ſay, they are not ſubject to the power of a maſter, and no body has a right of property over them.

§ 2.

In virtue of this ſtate, all men derive from nature itſelf, the power of doing what they think good, and of diſpoſing at their pleaſure of their actions and effects, provided they do nothing contrary to the laws of the country.

§ 3.

Among the Romans, a man loſt this ſtate when he was taken by the enemy in a public war, or when, to puniſh him for ſome crime, he was reduced to the condition of a ſlave.

§ 4.

But Chriſtians having judged that a ſervitude which gave the maſter power of life and death over his ſlaves,

ſlaves, was not compatible with the perfection to which the Chriſtian religion calls all men; it thence happened, that this kind of ſervitude was aboliſhed by moſt Chriſtian potentates, as well as in the territories and countries under our government; in ſo much, that the priſoners whom we take in war from infidels, are reckoned free men; ſo that he who ſhould kill one of thoſe priſoners, would be regarded and puniſhed as a manſlayer. From thence it follows, that whatever the Roman laws ordain concerning ſlaves, freed men, and maſters, is no longer of any uſe in our dominions.

And as the ſtate of liberty cannot be changed, nor in any manner loſt, and conſequently cannot be diſputed with any one whomſoever, the action called *prejudicial*, is not applicable in our dominions, in the meaning given it by the Roman laws.

§ 5.

Nevertheleſs, to ſlavery is compared proſcription, or the puniſhment of the ban, by which a man is condemned for a crime to loſe his life, with degradation and confiſcation of his goods. For though he be not ſubject to the power of another, and though the fiſcal acquire no right of property in his perſon, nevertheleſs the condition of the proſcribed perſon is ſo changed, that he is deprived of all the rights which were annexed to his perſon and condition.

§ 6.

As practice has alſo introduced into ſome of our provinces, another ſort of ſervitude and ſlavery, which does not indeed change the ſtate of the perſon, but which nevertheleſs, in a certain manner, affects the perſon himſelf in his condition, it is neceſſary here to give ſome account of this ſtate.

§ 7.

§ 7.

Thoſe men of a ſervile condition, who are called in German * *Eigenbehôrige*, or *Unterthanen*, are, with reſpect to their perſon, freemen, who may contract and diſpoſe of their actions and goods.

But theſe and their children are annexed to certain lands of their lords, which they are obliged to cultivate, and which they cannot leave without their conſent. Wherefore, even the girls cannot be married out of theſe lands, in which they are obliged to live and ſerve.

§ 8.

A lord acquires this right of property, 1.) By birth; the children of theſe ſlaves being in a ſervile condition, as well as their fathers and mothers: and, 2.) By way of bargain, when a free man voluntarily, and of his own accord, gives himſelf up to a lord in the ſtation of a ſlave.

§ 9.

By this means a prince acquires a real right over his ſervants in a ſervile condition, and he may redemand from any poſſeſſor a ſlave who belongs to him.

§ 10.

When a man denies that he is of a ſervile condition, the lord has the action called prejudicial, or preparatory; by which the queſtion of ſtate, whether he be of a ſervile condition or not, is previouſly to be decided, before the lord can redemand him.

§ 11.

He who affirms, that a perſon is of a ſervile con-

* *Homines proprii, glebæ adſcripti*, &c. that is, nearly what the French call people *in morte-main, des mortaillables*.—Perhaps colliers and ſalters in Scotland may be reckoned ſlaves in this ſenſe.

dition,

dition, is bound to prove it; for the preſumption is in favour of natural liberty. It would be another thing, if the lord were in poſſeſſion of the property of that perſon, or if his parents and predeceſſors had been of a ſervile condition. In theſe caſes it would be the defender's buſineſs to prove himſelf a free-man.

§ 12.

As in every province, where this kind of ſlavery is introduced, the right of property is differently regulated, we refer to the cuſtom of every place on that ſubject, ordaining that our courts conform themſelves to thoſe cuſtoms, in their decrees.

§ 13.

Finally, it is further to be obſerved on this ſubject, that if a man of a ſervile condition marry without informing the perſon whom he eſpouſes of his condition; we reſerve to her the liberty of cauſing annul the marriage; ordaining alſo, that the iſſue of ſuch a marriage be regarded as free, and held as ſuch.

TITLE VI.

Of the ſtate of a CITIZEN.

§ 1.

THE ſecond ſtate of men is that of a citizen. In fact, all men live in a civil ſociety, in which ſome are born, and others are received into it.

§ 2.

There are four orders of perſons in a civil ſociety:

1.) The

1.) The head; 2.) The citizen; 3.) The * inhabitants who are not admitted citizens; 4.) The † ſtrangers.

§ 3.

The three firſt orders only enjoy the ſtate of the citizen, and by that ſtate acquire ſome rights, which ſuch as are not members of the ſociety cannot claim.

§ 4.

In conſequence of this ſtate,

1.) The head of the civil ſociety acquires a right over its members, and over their actions.

2.) Thoſe are properly called citizens, who exerciſe any city-trade, and have been admitted citizens. They enjoy certain rights and privileges, which are not granted to the other inhabitants, who do not exerciſe a city-trade, and are not received citizens.

3.) The inhabitants, *incolæ*, who do not exerciſe a city-employment, and who are not received citizens, enjoy alſo ſome rights which are denied to ſtrangers.

§ 5.

In fine, ſtrangers, *advenæ*, who are only paſſing through our dominions, have not the ſtate of the citizen, nor conſequently enjoy the rights annexed to it; but they are in ſafety, by virtue of the common rights of mankind.

§ 6.

Whatever regards the conſtitution and œconomy of towns, as, for example, the eſtabliſhment of magiſtrates, the œconomy of town-houſes, the police, the privileges of citizens or burghers, their contributions, and other articles of that nature, being regulated by

* Incolæ. † Advenæ.

ſeveral edicts or regulations, iſſued from our general directory for war, of the finances, and of the demeſnes; and of our chambers of war, and of the demeſnes; we ordain, that theſe regulations be obſerved in all affairs which do not come under the department of juſtice.

And in order to know how far, and in what matters, magiſtrates and towns fall under the department of juſtice, we have declared our intention by a particular ordinance, which we order to be kept and obſerved for ever, as a permanent and immutable law.

§ 7.

The ſtate of a citizen, then, is a quality or condition of the perſons living in a civil ſociety; a quality which renders them capable of enjoying ſome rights which flow from that ſtate.

§ 8.

Whoever poſſeſſes theſe rights, may defend them againſt any one who diſturbs them in the enjoyment of them, by ordinary actions. But if the ſtate itſelf be diſputed with him, and if it be contended, that he is not member of a ſociety, and denied that he has a right to the privileges which citizens enjoy; the law grants him the prejudicial or preparatory action, by which the queſtion is examined, whether the ſtate of a citizen really belongs to him.

§ 9.

This action concerns the perſon himſelf, to whom is annexed the right which he can claim; conſequently differs from other actions, real or perſonal.

§ 10.

The ſtate of a citizen or freeman is loſt, and with it all the rights which were enjoyed as a member of

a

a ſociety, 1.) When one is proſcribed, but not when one is ſimply baniſhed from the dominions. 2.) When one leaves the country, and thus renounces the advantages of the ſociety of which he was a member. But in this caſe, one is bound to pay to his lord, or to the magiſtrate, a certain portion of his effects, which is called in Germany the outgoing duty, or the duty of *abzug*, *(cenſus emigrationis.)*

TITLE VII.

Of the family-ſtate.

§ 1.

THE third ſtate of perſons is the family-ſtate.

§ 2.

A family is a domeſtic ſociety, eſtabliſhed by nature.

§ 3.

When the word *family* is taken in a ſpecial ſenſe, it is only compoſed, 1.) Of the father of the family, who is the maſter of his houſehold and habitation; wherefore he is called the head of the family: 2.) Of the mother of the family, who voluntarily joined herſelf to her huſband, and followed him to his habitation, whereby ſhe became a member of her huſband's family: 3.) Of the children, who are the fleſh and blood of their father and mother, and who being thus a real portion of their bodies, neceſſarily belong to the family.

But when the word *family* is taken in a more general ſenſe, in it is comprehended, 4.) All the relations. For although, after the death of the father of

a family, every child ſhould ſettle a particular family, nevertheleſs, all thoſe who deſcend of one and the ſame ſtock, and who are by conſequence come of one and the ſame blood, are regarded as members of one family.

§ 4.

As all men are born in a family, and ſo derive the family-right from nature itſelf, whereby they acquire certain privileges; it follows, that this quality or condition of men forms likewiſe *a natural ſtate* of perſons.

§ 5.

The family ſtate, then, is a condition or quality of perſons, which makes them be regarded as members of a family, and renders them partakers of the rights and privileges annexed to that family.

§ 6.

Thoſe to whom theſe rights are due, may claim them by ordinary actions, againſt any one moleſting them in the enjoyment of theſe rights.

But if the family-condition itſelf be diſputed with them, by maintaining that they are not members of the family of which they pretend to be, it muſt previouſly be examined whether they are really ſo; for that purpoſe, prejudicial or preparatory actions are allowed them.

By theſe actions, he who complains that his ſtate is diſputed, claims the condition or quality which is immediately annexed to his perſon.

§ 7.

The family-ſtate is loſt by proſcription, by virtue of which a man is condemned to death, and declared deprived of all the rights of a citizen or ſubject. But that ſtate is not loſt by emancipation; for the imaginary ſervitude which the Romans ſuppoſed in emancipation,

cipation, and which occaſioned a change of that ſtate, is no longer in uſe.

§ 8.

It remains, that we explain more particularly the rights and advantages, which, by virtue of the family-ſtate, belong to all the members of a domeſtic ſociety.

TITLE VIII.

Of the rights of the huſband with regard to his wife; and of thoſe of the wife with regard to her huſband, proceeding from the family-ſtate.

§ 1.

AS the domeſtic ſociety, or family, is formed by the union of the huſband and wife, we are to begin with enumerating the advantages and rights which reſult from this union.

§ 2.

The huſband is by nature the head of his family. To be convinced of this, it is ſufficient to conſider, that the wife leaves her family to join herſelf to that of her huſband; that ſhe enters into his houſehold, and into the habitation of which he is the maſter, and grants him rights over her body, with intention to have children by him to perpetuate the family.

§ 3.

Hence it follows, judging by the ſole light of reaſon, that the huſband is maſter of his own houſehold, and head of his family. And as the wife enters into it of her own accord, ſhe is in ſome meaſure ſubject to his power; whence flow ſeveral rights and privileges,

leges, which belong to the huſband with regard to his wife.

For, 1.) The huſband has the liberty of preſcribing laws and rules in his houſehold, which the wife is to obſerve.

2.) If the wife be defective in her duty to her huſband, and refuſe to be ſubject, he is authoriſed to reduce her to her duty in a reaſonable manner.

3.) The wife is bound, according to her quality, to aſſiſt her huſband, to take upon her the care of the houſehold affairs, according to his condition.

4.) The huſband has the power over the wife's body, and ſhe cannot refuſe him the conjugal duty.

5.) As the huſband and wife have promiſed not to leave each other during their lives, but to ſhare the good and evil which may happen to them; the wife cannot, under pretext, for example, that her huſband has loſt his reaſon, leave him, without obtaining permiſſion ſo to do from the judge.

6.) For the ſame reaſon, the wife is obliged to follow her huſband, when he changes his habitation; unleſs, a) it has been ſtipulated by the contract of marriage, or otherwiſe, that ſhe ſhall not be bound to follow him if he ſhould incline to ſettle elſewhere; or, b) unleſs it were for a crime that the huſband changed his habitation, as if he had been baniſhed from his country.

§ 4.

The wife likewiſe enjoys certain rights and privileges with reſpect to her huſband. For,

1. As it is in quality of an aſſiſtant that the wife enters into the family with her huſband, ſhe ought to enjoy all the rights of the family. Thus ſhe carries her huſband's name and arms, ſhe partakes his rank, ſhe is under the ſame juriſdiction as he, &c.

Theſe

Theſe advantages are continued to her even after her huſband's death, as long as ſhe remains a widow.

2.) The huſband is bound to defend his wife, as well before the judge as elſewhere; wherefore alſo he may appear in a judicature for her, without a letter of attorney, provided he give ſecurity, that ſhe ſhall ratify what he does.

3.) The wife hath the power of her huſband's body, who cannot refuſe to pay her the conjugal duty, when he is not prevented by ſickneſs or other accidents.

4.) By virtue of theſe engagements, the huſband cannot, without committing adultery, have criminal correſpondence with another woman.

5.) Neither can he ſeparate from his wife, without very important reaſons.

6.) The wife ſucceeds to an equal portion with her children in her huſband's effects; unleſs by contract of marriage, or other ſettlements, the ſucceſſion be otherwiſe regulated. From this law are excepted the provinces, in which the ſtatutes of the country ſettle on the conjunct ſurvivor, a certain portion which is called *portionem ſtatutariam*; and thoſe in which the community of goods is introduced.

7.) The huſband is obliged to maintain his wife according to his rank and condition, whether he took her without dowery, or ſhe loſt her fortune after her marriage.

8.) In theſe caſes he is alſo obliged to bury her at his own charge.

TITLE

TITLE IX.

Of the rights and privileges which the father enjoys with regard to his children, and which flow from the family-ſtate.

(De patria poteſtate.)

§ 1.

THE father of a family has not only rights over his wife; he likewiſe acquires ſome over the children born of a lawful marriage.

§ 2.

The right of a father over his children is founded on reaſon: for the children are procreated in the houſe of which the father is maſter; they are born in a family of which he is the head; they are of his ſeed, and a portion of his body; they are not themſelves in a condition to provide for their own perſervation; and their father is obliged to take care of their education, till they arrive at the age of maturity. All theſe circumſtances ſuppoſe a certain power over the children, which is called paternal power.

§ 3.

Before reckoning up the rights and privileges of the paternal power, *(jura patriæ poteſtatis)*, it will be neceſſary previouſly,

I.) To explain the ſeveral means by which the paternal power is acquired. (See Art. I.). After which,

II.) We ſhall treat of the rights which the father has with reſpect to his children, by virtue of this power.

power, and in what manner it comes to an end. (See Art. II.). Then,

III.) We ſhall examine the privileges which flow from the family-ſtate, in favour of the children. (See Art. III.). And as,

IV.) The father hath a right over the fortunes of his children, (which conſiſts in what the laws call their *peculium*, or private ſtock). This ſhall be treated in Art. IV. of the childrens ſtock.

V.) Finally, ſhall be treated the privileges which the mother is to enjoy with reſpect to her children, and thoſe which belong to the children reciprocally with reſpect to their mother. (See Art. V.)

VI.) As alſo, the privileges which the other relations reciprocally acquire, in conſequence of the family-ſtate.

ART. I.

Of the different ways of acquiring the paternal power.

§ 4.

THE paternal power is acquired, 1.) By a lawful marriage.

2.) By legitimation; when an illegitimate child obtains the rights of a lawful child.

3.) By adoption, when one takes and receives as his own child, a ſtranger-child.

§ 5.

The paternal power then is acquired firſt and principally by a lawful marriage. Not to interrupt here the ſubject of paternal power, we refer to the ſecond book the explanation of what is underſtood by lawful marriage.

§ 6.

The ſecond way of acquiring the paternal power, is legitimation; which may be defined, A method approved by the laws, by which illegitimate children obtain the rights and privileges of legitimate.

§ 7.

Legitimation takes place, either by the * ſubſequent marriage of the father with the woman by whom he had the illegitimate child, or by † authority of the ſovereign.

§ 8.

The firſt ſort of legitimation which takes place by a ſubſequent marriage, ſuppoſes,

I.) That the father marries the woman with whom he had the correſpondence, which may be done at the hour of death, provided he have his judgemnt; and in this caſe it is not neceſſary that it be preceded by proclamation of bans; it is ſufficient that the marriage be ſolemnized. Whence it follows, that it is not ſufficient that the father have declared by word of mouth or by writing, that he acknowledges the perſon with whom he had correſpondence for his wife, and that he holds her children as legitimate. Moreover, it is not neceſſary that the children be preſent at the ſolemnization of the marriage, and that they hold the father by a lappet of his gown.

2.) That the illegitimate child give his conſent to it.

3.) That the father might, according to the laws, marry the woman with whom he had correſpondence. Whence it follows,

4.) That an illegitimate child may be legitimated,

* Per ſubſequens matrimonium. † Per reſcriptum principis.

even

even though the father, after having abuſed the mother, ſhould have married another woman, and procreated lawful children with her.

5.) When the father obtains a diſpenſation to marry the woman with whom he committed adultery in her huſband's lifetime, the children born of that adultery ſhall indeed be held as legitimate; but they may not ſucceed either to the father or other relations inteſtate. It would be otherwiſe, if the father had committed adultery with an unmarried woman, and that after the death of his wife he had married her.

6.) When the illegitimate ſon comes to die, leaving a child, that child may be legitimated by the marriage of the grandfather.

7.) By this legitimation the father acquires the paternal power, and all the rights reſulting from it, which ſhall be ſpoken of in Art. II.

This marriage has a retroſpective effect, and the illegitimate children are reckoned legitimate from the moment of their conception, and enjoy, reckoning after that time, all the privileges of lawful children. And this takes place, even though the parents ſhould proteſt, that they had no intention by marrying to acknowledge the children as legitimated.

Thus, children legitimated by the ſubſequent marriage of their father and mother,

a) Bear the name and arms of the father;

b) Partake his rank, his condition, and all the privileges annexed to the family.

c) If they demand letters or certificates of their birth, they ought to be made out without difficulty, as well as to the children lawfully born;

d) And be admitted to all freedoms, corporations, or colleges.

e) When any thing is regulated in the ſtatutes in favour of lawful children, thoſe regulations ſhall equally reſpect legitimated children.

f) They ſucceed to the father and other relations, in the ſame way as the lawful children; and

g) If they be paſſed unprovided, the teſtament ſhall be null.

h) If they be diſinherited without juſt cauſe, they may quarrel the deed on the head of undutifulneſs.

i) They are preferred, in regard of their rights of ſeniority, to the other children born after them in marriage, and they enjoy all the advantages annexed to that right.

k) When a brother appoints his legitimate brother his heir, the other brothers have no action; and are not founded in a claim to invalidate the teſtament, under pretext that their brother has appointed an infamous perſon. Nevertheleſs, children legitimated by the marriage of their father with their mother, cannot, according to the conſtitutions made in the aſſembly of the ſtates, ſucceed to the fiefs or feoffments in truſt, nor to what is called in Germany *majorat*.

§ 9.

In the ſecond place, illegitimate children may be legitimated by authority of the ſovereign, when by a reſcript he grants them the rights of lawful children; or when the father, by conſent of the ſovereign, declares them legitimate in his will, and conſtitutes them at the ſame time his heirs. It is then the ſovereign alone who can legitimate illegitimate children. And thoſe who are called *Counts Palatine*, be they confirmed by us or not, can no longer aſſume to themſelves this right, on account of the abuſes which they have occaſioned. Suppoſing even the Count Palatine's letters patent formerly granted him the privilege of legitimating baſtards, thoſe patents ſhall be reckoned to have been obtained by ſub and obreptions; and our will is, that the Count Palatine who ſhall grant ſuch letters of legitimation, be puniſhed,

niſhed; and the legitimation be itſelf without effect. This is likewiſe to be underſtood of Counts Palatine who have heretofore obtained ſuch conceſſions, which, for the future, ſhall be of no avail to them.

But that legitimation by the prince's reſcript may take place, it is requiſite,

1.) That the father have it not in his power to marry the mother of the illegitimate child, and that, conſequently, the child cannot be legitimated by the marriage of its mother; for example, if it were born in adultery of a woman having a huſband, or in inceſt, or even if the mother were dead:

II. That the father deſired it, and for that purpoſe uſed ſolicitation with the ſovereign.

When, then, illegitimate children themſelves, or their mother for them, ſolicit for legitimation, they do not acquire the right of ſucceſſion, even though that were expreſſed in the letters of legitimation; for we neither have a right, nor is it our intention, to deprive the agnats of the rights which they have by law. They ſhall not even bear their father's name, nor his arms, if we have not expreſsly granted them this advantage in the letters patent; neither are they any longer under the paternal power.

The privilege, then, which ſuch legitimated children acquire, conſiſts only in this, that they cannot be reproached with the fault of the father and mother, and cannot be excluded from offices or communities.

III.) That if there be lawful children, it is further requiſite that they give their conſent to the legitimation. If there be none, the children ſo legitimated acquire indeed the rights of lawful children, but they ſhall not ſucceed to their father inteſtate.

This, however, is only to be underſtood of the children exiſting at the time of the legitimation; for thoſe who are born afterwards, cannot render it invalid.

Neither

Neither can the oppoſition of other relations hinder its effect.

IV.) It is moreover required, that the illegitimate child, or its guardian, conſent to it.

V.) Children thus legitimated by the prince's reſcript, at the requeſt of the father, obtain all the privileges of lawful children, whether they be born of a concubine or of a proſtitute. They bear the name and arms of the father, they are his neceſſary heirs, *ſui hæredes*, and under his power, in the ſame way as his own lawful children. But they by no means ſucceed to the fiefs, feoffments in truſt, and *majorats*; far leſs do they obtain the rank of nobility and its rights, though the father be noble, if the reſcript do not expreſsly grant them that advantage.

Neither do they ſucceed to the relations by the father's ſide inteſtate, even though, in the letters patent, the right of ſucceſſion in general be granted them.

§ 10.

The third method of acquiring the paternal power, is adoption, which is an act, by which one takes and receives a perſon whom he has not under his power, for his own child, juſt as if he were born under his power.

I. When a perſon is what is called *ſui juris*, or maſter of his own rights, that is to ſay, is not under any paternal power, and that perſon is adopted, this act is called *arrogatio*. But when a perſon is adopted, who is under the paternal power, the act is called *proper adoption*.

II. As to the firſt ſort of adoption, *arrogatio*, that is to ſay, of a perſon who is not under paternal power,

1.) All thoſe who have no child, nor hopes of having any, may adopt in this manner, be they married or not; for when they have children, or hopes of having any, it would be unneceſſary to take the benefit of

of the law, to obtain what nature has already granted, or allows them ſtill to expect. Wherefore,

2.) Thoſe who are below ſixty years, cannot adopt, becauſe they may marry and have children; unleſs, for particular reaſons, of which the judge is to take cognizance, they obtain permiſſion for ſo doing

3.) He who adopts, ſhould at leaſt be eighteen years old, it being requiſite, that one who undertakes an affair ſo important, ſhould at leaſt have attained to a full and judicious puberty.

4.) He ought alſo to be older than him whom he adopts; becauſe, according to the courſe of nature, a father cannot be younger than his own ſon.

5.) He who by his own fault is deprived of the power of generation, cannot adopt; which prohibition regards only thoſe who have made themſelves eunuchs, and not thoſe who have been made ſo by their parents in their youth.

6.) Women not having the paternal power, cannot adopt. Nevertheleſs, thoſe are permitted to do ſo, who have had children and loſt them.

III.) We may adopt all ſtrangers, male or female, who are maſters of their own rights, that is to ſay, who are not under paternal power. A father may even adopt, *arrogare*, the ſon whom he had before emancipated; and the grandfather his grandſon, whoſe father had been emancipated.

IV.) But it is requiſite, that thoſe who are adopted, be preſent at the act, and conſent to it in expreſs terms; as it is not ſufficient that they do ſo by proxy, by writing, or tacitly.

V.) Our will is alſo, that our royal confirmation be aſked, becauſe thereby a family becomes extinct, the head paſſing into a ſtrange family.

VI.) In the adoption of a minor, or of a pupil, the following ſolemnities are to be obſerved:

1.) The guardian, or curator muſt conſent to the adoption,

adoption, as well as the pupil or minor: but if the pupil be ſtill an infant, that is to ſay, be leſs than ſeven years old, it ſhall ſuffice, that the guardian conſent to the act.

2.) The judge ſhall cauſe call ſome of the neareſt relations of the perſon intended to be adopted, and ſhall carefully examine with them, if he who wants to adopt him be of good morals, and of an irreproachable life; if he be not influenced by ſuſpicious reaſons to adopt the pupil or minor; if it be his intereſt, that adoption take place, &c.

3.) If there be no obſtacle to the allowing the adoption, the adopter ſhall give ſufficient ſurety, that if the pupil ſhould die before attaining the age of puberty, or the minor, without making a teſtament, he ſhall return his inheritance to his neareſt relations.

4.) He who thus adopts a pupil or minor, cannot, without an important cauſe, emancipate him; and if he do ſo, he ſhall be bound, not only to reſtore him all that belongs to him, but alſo to give him, not the legitim or portion-natural, but the fourth part of his own proper fortune.

But if the adoptive father has good reaſons to emancipate the adopted, the latter can only claim the fortune which belongs to him in property.

It is the buſineſs of the judge, to take cogniſance of the juſtice of the cauſe of adoption, and to decide as he ſhall ſee right, after having named a guardian or curator to the adopted.

5.) Guardians and curators cannot adopt pupils or minors intruſted to their care, till after giving up their accounts, and getting other guardians and curators appointed; and till the motive and circumſtances occurring in the petition of adoption be examined, as is above preſcribed.

VII.) By an adoption, *arrogatio*, of this kind, the adopter acquires a full paternal power, with all rights depending

depending on it, not only over the adopted, but alſo over his children and family. Hence it follows, that the adopter may give them an heir by a pupillary ſubſtitution, name them a guardian by his will, &c.

VIII.) The adopted perſon, *arrogatus*, comes out of his natural father's family, and neither ſucceeds to him, nor to the other members of the family, inteſtate: the pupillary ſubſtitution made by the natural father, falls; and if he has appointed him a guardian by will, it ſhall not be neceſſary to confirm it, excepting ſo far as he may have left him any legacy.

The adopted perſon, *arrogatus*, acquires all the rights annexed to the family of the adopter; he becomes the neceſſary heir, *ſuus hæres*, of the adoptive father, who cannot forget him in his will, without rendering it null, nor diſinherit him without a juſt cauſe; and when he has juſt cauſe to diſinherit the adopted perſon, he is, nevertheleſs, bound to reſtore to him the fortune which belongs to him in property.

IX.) Theſe adopted perſons, however, acquire only the civil rights annexed to the family, and ſo only the rights of agnation; but they cannot acquire the right of blood, or of cognation. Wherefore the wife of the adopter does not come in place of a mother to the adopted; and the maternal aſcendants cannot be reckoned as the predeceſſors of the adopted; conſequently he cannot ſucceed to them inteſtate. Neither can theſe adopted perſons, according to the conſtitution of the country, have any ſhare in the fiefs; which, it is our pleaſure alſo, ſhould be obſerved with regard to feoffments in truſt, and *majorats*.

The caſe would be different, if one were adopted by a paternal aſcendant, or agnat, becauſe, in this caſe, the natural rights of blood or of cognation meet in the ſame perſon with thoſe of agnation; and ſo the adopted does not ſucceed to thoſe effects in virtue of

the adoption, but by the foreſight of his anceſtors *. But if one were adopted by a maternal aſcendant or relation, he would not ſucceed to theſe effects, unleſs the females had obtained the right of ſucceeding to them, or the ſovereign had granted him the reverſionary ſucceſſion of them.

The adopted, called *arrogatus*, acquires by adoption ſeveral actions:

1.) The prejudicial or preparatory action, when his ſtate is diſputed, and it is denied that he is lawfully adopted.

2.) The demand of the inheritance †, when the ſucceſſion of the adopter is kept from him.

3.) The action for the family-ſhare ‡, when there ariſes a difference among the coheirs concerning the diviſion of the ſucceſſion.

4.) The action for undutifulneſs ||, when he has been diſinherited without juſt cauſe, or the fourth part of the effects have not been delivered to him entire, &c. And,

5.) All the actions which lawful children have by virtue of the family-right.

§ 11.

When one adopts for his ſon one who is not what is called maſter of his own rights, that act is called *a ſpecial adoption* **, without the neceſſity of diſtinguiſhing whether the paternal power be a conſequence of lawful marriage, or of legitimation, or even of the adoption which is called *entire* ††.

Such as cannot adopt children by the method called *arrogatio*, neither can they do it by that which is called *ſpecial adoption*. (See § 9. n. 11.) Neither can a father adopt his illegitimate ſon in either manner,

* Ex providentia majorum. † Petitionem hæreditatis.
‡ Familiæ erciſcundæ. || Querelam inofficioſi.
** Adoptio in ſpecie. †† Plenam adoptionem.

becauſe

becauſe he may acquire the paternal power over him by means of legitimation.

All ſuch as are under paternal power may be adopted, though they be in the age of puberty, without the neceſſity of requiring our royal confirmation: it will be ſufficient that the act be confirmed by the judge-ordinary. When the judge himſelf ſhall be adopted, or he ſhall adopt any one, the aſſeſſors, or elſe the ſuperior judges, ſhall give the confirmation.

To render valid the adoption properly ſo called, or ſpecial adoption, it is requiſite,

a) That the adopted conſent to it: but it is not neceſſary, that the conſent be expreſs; it ſhall be ſufficient if he be preſent and do not oppoſe it, or that, on account of his non-age, he cannot oppoſe it.

b) That the natural father of the adopted give his conſent to it.

But the conſent of relations is not at all neceſſary.

There is a diſtinction to be made with regard to the effect of *adoption properly ſo called*, or ſpecial adoption, between the adoption made by an aſcendant, and that which is made by a ſtranger. For in the firſt caſe, the adoption properly ſo called is a means of acquiring a paternal power, but it is not ſo in the ſecond.

§ 12.

I. The effect of adoption properly ſo called, made by an aſcendant, is ſuch, that it gives a full paternal power over the adopted, with all the rights depending on it.

And the adopted acquires all the rights which lawful children enjoy; for in this caſe the rights of agnation, which are due by virtue of the family-right, meet in the ſame perſon, with thoſe of cognation, which flow from the ties of blood. (See above, § 10. n. 9.) Wherefore, the children adopted by an aſcendant,

ſucceed in their order to the fiefs, feoffments in truſt, majorats, &c. as well as the lawful children. (See the ſame.)

II. When a gentleman ſhall adopt the child of a burgeſs, or peaſant, be he under the paternal power or not, that child ſhall not acquire the rank of nobility or gentry, even though we ſhould confirm the adoption.

The ſame ſhall be the caſe, when a count, or lord baron ſhall adopt for his ſon a gentleman, who ſhall not thereby be raiſed to the dignity of a count or baron. That the adoption may have that effect, we muſt have formally declared ſo in the act by which we confirm the adoption.

III. A perſon who is adopted by an aſcendant, has all the actions that he has who is called *arrogatus*. (See § 10. n. 9.)

IV. If thoſe who are adopted, in whatever manner it be, find themſelves injured by the adoption, they may demand to be reſtored to their former ſtate.

§ 13.

When one adopts a ſtranger, who is under paternal power, and who does not deſcend from the adopter; that ſort of adoption does not acquire to him the paternal power, but the adopted continues under the power of his natural father, both with reſpect to the rights of agnation and cognation, and obtains only the right of ſucceeding to the effects of the adopter inteſtate.

Even though one ſhould adopt a ſtranger, to come in place of a grandſon, and regard him as if he were born of his own ſon, neither the adopter nor his ſon would thereby acquire the paternal power, but the adoptive ſon would acquire ſolely the right of ſucceeding inteſtate. As then a perſon adopted acquires no other

other filial right *, but that of ſucceeding inteſtate, the adopter may paſs him over in his will, and is not bound to leave him the ſmalleſt thing in his teſtamentary ſettlements.

Moreover, a woman, and any perſon who has no children, whatever their age be, provided they be of age, may adopt in this manner.

In caſe, after the adoption, of whatever kind it be, the adopter marry, and have children of his marriage, or legitimate his own illegitimate children, the adoption ſhall not thereby be annulled.

§ 14.

Cuſtom has introduced another kind of adoption, called *the union of children* †. It took place when two married perſons, having each children of a former marriage, received them into the number of their children, and common heirs. But this union is ſubject to many inconveniencies which occaſion law-ſuits, and is, beſides, not very uſeful; for the married perſons may, by the method of adoption, or by their teſtamentary ſettlements, be uſeful to theſe children of another marriage. Having regard to which, we, for the future, aboliſh this union of children of different marriages.

ART. II.

Of the rights or effects of the paternal power with regard to the children, and how it comes to an end.

§ 15.

AFter having ſhown the means of acquiring the paternal power, it is neceſſary to treat of the

* Jura filii. † Unio prolium.

rights

rights and privileges which the father obtains by that power, with regard to his children, which are founded in nature itſelf.

§ 16.

The ancient Roman laws granted to the fathers called *Quirites*, a kind of property over their children, which they called *dominium quiritarium*. On this foundation they allowed a father to ſell them, or expoſe them in caſe of urgent neceſſity, and even to take away their life, when they had committed a crime.

Children had no property: whatever they acquired, or came to them from others, belonged to the father; in ſo much that the dowery of the ſon belonged in property to the father.

Wherefore, a ſon could not, without his father's conſent, intent an action for himſelf, nor defend himſelf, nor make a will.

There was no civil obligation between the father and the children; and neither of them had any action for the matters on which they had mutually agreed; which went ſo far, that the father could not even give any thing to his own children.

When the children were carried away from the father, he had an action of theft, *actionim furti*, which is only granted to the owner; and where his children were concealed, he had, in quality of a maſter or proprietor, an action of exhibition *, as well as a claim of right or challenge †.

§ 17.

But this right of property having been aboliſhed afterward, and the eſtabliſhment of ſeveral *peculiums* or proper ſtocks in favour of children having procured them the liberty of diſpoſing of moſt of their

* Actionem ad exhibendum. † Rei vindicationem.

effects,

effects, it thence happened, that the laws reſerved for the father only the privileges, which being annexed to the family and blood, are thence deduced from the principles of ſound reaſon.

§ 18.

I.) Thus children are obliged to obey their father as the head of their family, and author of their exiſtence, and to ſubmit to his commands, in ſo far as there is nothing in them contrary to laws divine and human.

Which if they do not, the father has authority to reduce them to their duty by moderate and rational chaſtiſement; he may, with this intent, confine them in his houſe, and keep them under ſubjection.

But he has no right to treat them tyrannically, nor to beat them till they fall ſick; far leſs to confine them in the houſe of correction, till the judge has taken cogniſance of the fault.

§ 19.

II.) For the ſame reaſon children ought to have all manner of reſpect for their father, and do nothing hurtful to his reputation; wherefore they cannot intent any action againſt him *, nor alledge any exceptions which may hurt his honour; but in caſe they have any proſecutions of this nature before a judge, they ſhall be obliged to manage them with becoming caution, which the lawyers call *ſub qualitate actionis in factum.*

§ 20.

III.) Moreover, what children acquire belongs no longer in property to their father, but they may diſpoſe of it at their pleaſure, either by a deed to take place in their lifetime, *inter vivos*, or after their death by

* Actionem famoſam.

will,

will, they leaving the legitim or their portion to their father: and this takes place in regard to all childrens effects, excepting what is called their *profectitious peculium*, or *proper ſtock*, or that given by their father, and their *adventitious peculium*, or *proper ſtock*, or that given them by others. The reaſon is, that the father has the property of the firſt, and the uſe and profit or liferent of the ſecond. This ſhall be treated more at length, in Art. IV.

Thus, children may treat with their father in regard to their other effects; they may, for example, contract with him, make him preſents, and receive ſuch from him, &c.: whence ariſe the reciprocal actions of the father againſt his children, and of the children againſt their father.

§ 21.

IV.) As, then, children make a part of a family, and are procreated with an intention to perpetuate it, it is moſt certain, that, after the father's death, all the rights of the family devolve on them, that is to ſay, they become his proper and neceſſary heirs, *ſui hæredes*; conſequently they ſucceed equally to the employments and advantages of the family, and, in quality of heirs, they are bound for the father's deeds, unleſs they declare judicially, that they renounce his ſucceſſion. (See below, article following, § 33.)

It may eaſily be concluded from what has been ſaid, that the reaſon why children may not marry without their father's conſent, is, that they cannot, againſt his inclination, augment the number of the family of which he is the head; far leſs appoint him an heir againſt his inclination.

§ 22.

V.) As children are not only conſtituent parts of the family, but are even a portion of their father's body, and

and are in ſome ſort but one perſon with him, he has a right to defend the members of his family, and of his body, and to take care of their preſervation. For this reaſon, a father,

a) May defend his children before a judge, when they are criminally proſecuted;

b) Appear for them without a letter of attorney;

c) Solicit the reparation and puniſhment of injuſtices and injuries done to them;

d) Appoint them an heir by a pupillary ſubſtitution; and,

e) Name for them guardians by his will.

f) For the ſame reaſon, the vows by which children conſecrate themſelves to the monaſtic life, are null without the father's approbation.

g) If his children be concealed, he may intent an action of exhibition *, to oblige them to be exhibited and returned into his hands; and,

h) If they be carried off from him, he may raiſe an action on account of violence offered †.

§ 23.

As children are but one perſon with their father, and are, ſo to ſay, inſtruments which nature has given him, they may contract in his favour, that is to ſay, by their agreements made with a third perſon in name of their father, they acquire for him a right of ſuing at law.

Thus, if any one declares to a ſon, that he makes a preſent to his father of one hundred rix-dollars, or forgives him a debt, or grants him a right of ſervitude, &c. and the ſon accepts it in the father's name, it is the ſame thing as if the father himſelf had contracted, and he acquires, by the deed or paction of

* Ad exhibendum. † Actione de vi privata vel publica.

his ſon, a right of ſuing for the fulfilling of the agreement.

§ 24.

It further reſults from this unity of perſons, that if the children obtain poſſeſſion of a thing which makes part of the ordinary profectitious or adventitious peculium, or proper ſtock, the father obtains it by the deed of his children, even when he had no knowledge of it.

Provided, that the ſon acquire nothing for the father with regard to thoſe peculiums, but what the father may in fact claim. Thus, when a neighbour grants to the ſon, poſſeſſor of the peculium, the right of paſſing for his own perſon in his fortune, and acting in it, &c. the father can nowiſe aſſume to himſelf this right which was not acquired for him.

§ 25.

This unity of perſons ceaſes,

1.) If a father, inſtead of acquiring any thing, ſhould, on the contrary, find himſelf engaged for the ſon's deeds, ſo that the father cannot be ſued for the ſon's debt, unleſs the ſon had a profectitious peculium, for which the father is bound.

The unity of perſons ceaſes alſo,

2.) In public affairs; wherefore the ſon may ſit judge on his father, and, in that quality, confirm the deed which his father made. He may alſo, without his father's conſent, accept of public offices, ſuch as guardianſhips. In fine,

3.) Unity ceaſes in queſtions criminal, the father being no more reſponſible for the crimes of his children, than they are for the wicked actions of their father.

§ 26.

The paternal power ends,

1.) By the death of the father or of the children.

The

The latter, after the death of their father, do not fall under the power of their grandfather, but remain under the inſpection and guardianſhip of their mother; and if the mother die, or will not become guardian, the grandfathers are bound, in quality of natural guardians, to take care of their grandchildrens education, and to preſerve their fortune.

2.) By proſcription, or forfeiture, when either of them is proſcribed, or declared an enemy to his country; which ſhall alſo take place with regard to deſerters.

3.) By the emancipation of the ſon, when he is adopted by his grandfather; which is the only caſe of emancipation now in force. Wherefore alſo the father can no longer demand the price of emancipation, namely, the half of the ſon's fortune.

4.) By the expoſure of the child, whether he be expoſed in public, or near a church, or in a private houſe.

5.) By the abuſe of the paternal power, as when a father treats his children tyrannically, or proſtitutes them, or induces them to infamous actions.

§ 27.

In all theſe caſes, the paternal power comes to an end, and conſequently all the rights flowing from it; although thoſe which are a conſequence of the ties of blood, ſubſiſt in their full force. Thus, the loſs of the paternal power does not hinder marriage within the degrees forbidden, from continuing ſtill prohibited, nor a ſon who kills his father from being ſtill a parricide.

§ 28.

I.) A child is not freed from the paternal power, when he ſettles and takes up family with the conſent of his father; the father, in that caſe, preſerving all the rights of paternal power. There is no exception, but in regard to the ordinary adventitious

peculium, of which the father is obliged to leave the uſe and enjoyment to his ſon, in order to defray the expenſe of houſe-keeping; and the ſon may diſpoſe of that peculium at his pleaſure, even though he ſtay in his father's houſe.

We do not reckon as children who ſet up a ſeparate family, thoſe who make a voyage, nor thoſe who are in ſervice, nor thoſe who are in the army, unleſs, in this laſt caſe, the father had refuſed all aſſiſtance to his ſon who is bearing arms in the ſervice of the ſtate.

§ 29.

II.) Neither does the paternal power come to an end by the marriages which children contract with the conſent of their father; the latter loſes only, as is decreed in the preceding ſection, the uſe and enjoyment of the child's adventitious peculium or proper ſtock.

The paternal power ſubſiſts likewiſe, even ſuppoſing the married children continue at bed and board with their father, and have had rich portions out of their father's fortune, and even though their marriage ſhould afterward be diſſolved.

§ 30.

III.) Neither is the ſon freed from the paternal power, when he gets an employment of conſiderable dignity, and the father even preſerves the uſe and enjoyment of the adventitious peculium, unleſs the ſon keep houſe by himſelf, or marry with the conſent of the father.

§ 31.

Finally, much leſs does the father loſe the paternal power,

IV.) When his children are made priſoners by the enemy, or even reduced to ſlavery;

V.) When

V.) When they go into a convent without his conſent; and,

VI.) When they are diſinherited by him. Neither can a child allege preſcription againſt the father, and pretend, that having taken care of him for thirty years, he is releaſed from his power.

ART. III.

Of the rights and privileges which ariſe from the family-ſtate, in favour of children, with regard to their father.

§ 32.

AS the father, by the family-ſtate, acquires certain rights with regard to his children; the children, in their turn, acquire likewiſe, by that ſtate, certain rights with regard to their father.

§ 33.

For, 1.) They participate the privileges annexed to their father's family: they carry the father's name and arms, they are ſubject to the ſame juriſdiction, &c.

§ 34.

2.) They perpetuate the family after the father's death, and they ſucceed to all the rights which it enjoys, and conſequently to all the effects which the father has left; wherefore, they are his neceſſary heirs, *ſui hæredes*, without any neceſſity of a particular entry to the inheritance. (See Art. II. preceding, § 21.)

§ 35.

3.) Children cannot be paſſed over in ſilence in their father's will, nor diſinherited without cauſe.

§ 36.

4.) The father is bound to educate his own children.

5.) To

5.) To maintain them when they have no effects of their own. What is to be underſtood by maintenance, which he is to furniſh them, will be explained afterward, book II. title VI. § 9.

6.) He is likewiſe bound to portion his daughters, and furniſh his ſons with the means to make the marriage-donation.

§ 37.

7.) Neither can the father be excuſed from burying his children at his own charge, when they are indigent.

§ 38.

8.) When a father will not acknowledge his children for his own, or will not reckon them his lawful children, and, for this reaſon, wants to deprive them of the rights of their ſtate, they may claim thoſe rights by a prejudicial or preparatory action.

ART. IV.

Of the peculium or private ſtock of children.

§ 39.

WE have mentioned in art. II. § 6. the father's rights over the effects of his children, and declared, that the *profectitious peculium*, or *peculiar ſtock*, belongs to him in property, and that he has the uſufruct, or uſe and enjoyment of the ordinary adventitious peculiar.

That it may be known what the peculiar is, we ſhall here explain its nature and properties.

§ 40.

Children have four ſorts of peculiars.

1.) The *profectitious*; 2.) The *adventitious*, both ordinary

ordinary and extraordinary; 3.) The *caſtrenſe*, or *camp*; and, 4.) The *quaſi caſtrenſe*, or *ſuppoſed camp*.

§ 41.

The *profectitious peculiar* takes place, when a father, or a ſtranger on the father's account, gives a ſon a part of his fortune to adminiſter, to improve, and to keep a particular account of it, ſeparate from his father's accounts.

§ 42.

A father may give a peculiar to all his children, ſons or daughters, and even to thoſe who are yet in nonage.

When a ſtranger gives any thing to children upon their father's account, this gift belongs to the profectitious peculiar.

But the donor muſt expreſsly declare, that he gives the gift in conſideration of the father; otherwiſe what he may give, ſhall belong to the adventitious peculiar.

§ 43.

The father has not only the full property of this peculiar, but he has likewiſe the poſſeſſion of it by his ſon, who is only the keeper of it, and who acquires to the father, even though without his knowledge, all the profit he draws, both with regard to the property and poſſeſſion.

Whence it follows,

a) That the father may, at his pleaſure, take this peculiar out of his ſon's hands, provided it be not to the prejudice of creditors.

b) That, at his father's death, the ſon is obliged to bring it into the maſs, or common ſtock, of his ſucceſſion.

c) That the ſon can give nothing out of this peculiar; and that all he has given may be redemanded by the father or his heirs, unleſs the donation made, were

were by way of recompenſe, or the dignity and character of the donor required him to make ſuch a preſent.

When the father emancipates his ſon, and does not at the ſame time redemand this peculiar, he ſhall not afterward have any right to demand it, but ſhall be reckoned to have made a preſent of it to his ſon.

§ 44.

From what has been ſaid of this peculiar, it follows, that the father and the ſon cannot contract, traffic, or negotiate together, with regard to this ſort of peculiar; becauſe the father, in treating with his ſon, would in effect treat with himſelf, and would acquire what he already has in property; and, indeed, there can be no action between them for ſuch affairs.

§ 45.

When the ſon contracts with a ſtranger, the father is bound by his ſon's contract, becauſe it is with the father's conſent that the ſon has the adminiſtration of the peculiar. Wherefore, alſo, the father cannot be exempted from paying the debts contracted by the ſon upon his peculiar, even to its full value: for this purpoſe, creditors have an action againſt him for the peculiar *.

§ 46.

The action for the peculiar is then nothing elſe but the principal action ariſing from the ſon's engagement; but as the father himſelf has not contracted, and is not bound to pay, but as far as the peculiar goes, it was thought proper to diſtinguiſh this action by a particular name, and to call it *the action for the peculiar*. And, indeed, the reaſon for its laſting, or being competent, thirty years, is, that the principal action, which

* Actionem de peculio.

is

is founded on the ſon's engagement, continues, or is competent, all that time.

When the father takes back this peculiar, or when it otherwiſe ceaſes, the action for the peculiar is competent only for the ſpace of one year. If it be not intented by the creditors within that time, they cannot afterwards ſue the father.

§ 47.

It has already been remarked, that the father is bound to ſatisfy the creditors only to the extent of the peculiar. The reaſon is, that he gave his conſent only that far to his ſon's tranſactions, on account of the peculiar. But if the peculiar were diminiſhed by the father's fraud, he ſhall be bound to indemnify the creditors, of whatever part of that ſtock ſhall be loſt by his fault.

§ 48.

The father, nevertheleſs, has a right to deduct from the peculiar, preferably to all creditors, as by right of retention, what claims he has on that ſtock, or what his ſon owes him, on account of thoſe under his power, guardianſhip, or truſteeſhip, as well as on account of thoſe whoſe affairs he managed.

§ 49.

The father is not bound to anſwer for the frauds which his ſon commits to the prejudice of his creditors; becauſe, when he granted his ſon the power of negotiating, he did not intend to authoriſe him to commit wicked actions; we muſt, however, except caſes in which the father takes the advantage of his ſon's fraud.

§ 50.

The profectitious peculiar is of uſe among merchants, when a tradeſman, to train up his children to buſineſs, allows them to undertake any particular

branch, and intrusts them with a certain sum in money, or wares.

§ 51.

The *adventitious peculiar* is the fortune which the child acquires, without its coming from the father, and without its being given expressly out of regard to the father.

§ 52.

Whatever comes to children by the mother's side, or from their brothers and sisters, all that has been given them, left them in legacy, &c. by a stranger, and all that they acquire by their industry and labour, belongs to the adventitious peculiar.

§ 53.

All the children, sons and daughters, in nonage, or in puberty, may possess such a peculiar.

§ 54.

The son has the property of it, and the father the usufruct, or use and enjoyment.

§ 55.

The usufruct belongs to the father,

a) Even though the peculiar should consist in the administration of an incorporeal thing, such as a jurisdiction, a hunting, &c.

b) Or though it should consist in one of those things which are consumed by using; and, in this case, it shall be sufficient, if he afterwards restore a like thing equal in kind, in quality and goodness.

c) The father has also the usufruct of this peculiar, although the son be dead before him.

d) When this peculiar consists only in the usufruct of a thing, the father enjoys it during his life; and, after his death, his son has the enjoyment of it, till he die likewise.

e) The

e) The father having the uſufruct of this peculiar, it follows, that he alone has the adminiſtration of it, and he alone can ſue with the ſon's conſent, or be ſued upon that account. This takes place even though the children be of age. Neither is he obliged to take an inventory of the peculiar, nor to be accountable for it. In fine,

The ſon can alienate nothing of the peculiar without the father's conſent.

§ 56.

The ſettlements made by the father, in regard to the property of the peculiar, or in prejudice of the peculiar, without the ſon's conſent, are null; unleſs,

a) He were abſent, or were incapable of giving his conſent.

b) Or, that the father had given ſecurity, that the ſon ſhall ratify what he did; or,

c) That, by the alienation of the peculiar, the ſon's affairs had been meliorated; as for example, if it had been uſed to diſcharge his own debts; in which caſe it is not even neceſſary to aſk the judge's permiſſion to alienate *.

§ 57.

The uſufruct of this peculiar no longer belongs to the father, and he has no longer the adminiſtration of it, when once the paternal power ceaſes, or his children marry with his conſent, or he allows them to have a ſeparate houſehold.

§ 58.

Children, on account of this peculiar, have a tacit hypothec, or mortgage over all their father's effects.

§ 59.

As there are ſeveral caſes in which the uſufruct does

* Or a decree *de alienando*.

not belong to the father; to the ordinary adventitious peculiar, juſt mentioned, is oppoſed the extraordinary adventitious peculiar, which comprehends the effects of which the father has not the uſufruct.

§ 60.

Thus, under the *extraordinary adventitious peculiar* is comprehended,

1.) What is given to children by the prince.

2.) What is given to them, or left them in legacy, on condition that the father ſhall not have the uſufruct of it.

3.) What they acquire againſt their father's will.

4.) What they inherit along with their father, of the effects of a brother-german.

5.) The fortune, of which the father has once renounced the uſufruct.

6.) The gain which children make by their marriage: thus the marriage-portion, the nuptial donation, the dowery, the nuptial preſents, and thoſe which are made the day after, *morgengabe*, belong to them with all the uſe or advantage that can be made of them.

7.) What they received from their godfathers and godmothers.

Except in the caſes juſt ſpecified, the father has the uſufruct of all the effects of his children, not comprehended under the peculiars called *caſtrenſes*, or *camp*.

§ 61.

The father has then, with reſpect to the extraordinary adventitious peculiar, neither right nor uſufruct, nor adminiſtration; but the ſon may diſpoſe of it as he pleaſes, without the conſent of his father, either by deeds between living perſons, *inter vivos*, or by ſettlements in proſpect of death. But if the ſon were abſent, or incapable of managing his own affairs, and the perſon who furniſhed the peculiar named no guardian

guardian for him; the father, in quality of adminiſtrator in law of his ſon's effects, ſhall be obliged to take the adminiſtration upon himſelf, or elſe to get a curator or truſtee nominated for him: in the firſt caſe, he is obliged every year to give an account of his adminiſtration.

§ 62.

The *peculium caſtrenſe*, or camp peculiar, is what the ſon acquires in the army, or on account of war. Not only all that is acquired in the army, moveable or immoveable, belongs to this peculiar, but even the acquiſition made by way of exchange, or by way of purchaſe, with the money gained upon that peculiar.

What is given to children for their equipment, either by the father or by a ſtranger, belongs likewiſe to the camp peculiar. But preſents made to a military man in any other caſe, belong to the ordinary adventitious peculiar.

§ 63.

The camp peculiar can be poſſeſſed by none but ſons who are preſently in the military ſervice, or who deſign to enter into it.

The camp peculiar ſubſiſts, though the ſon be diſcharged, and though he employ it in purchaſing other things.

§ 64.

The ſon has the whole property of this peculiar. He poſſeſſes it in his own name, he does not bring it into the maſs of his father's ſucceſſion, but diſpoſes of it at his own pleaſure, even without his father's conſent; ſo that he may alſo make agreements with his father concerning this peculiar, which are effectual. In one word, he is reckoned father of a family with reſpect to this peculiar.

§ 65.

§ 65.

So the father has not the leaſt right over this peculiar, and can neither manage it nor diſpoſe of it. When the ſon dies, the father does not ſucceed ſingly, but the defunct's children, and even his other relations, have right to it, according to the ſettled order of ſucceſſion.

§ 66.

The *peculium quaſi caſtrenſe*, or camp-like peculiar, is the fortune acquired by a ſon not in the army *, but in employments, or by his own labour or induſtry. Conſequently, to this peculiar is referred, not only the ſalary annexed to a civil or eccleſiaſtic office, but even all gained by thoſe who have employments without ſalaries, as doctors, advocates, notaries, &c. and thoſe who, without having employments, turn their time and induſtry to account, ſuch as painters and other artiſans: what is given to a ſon to procure a place, belongs likewiſe to the camp-like peculiar.

§ 67.

The father, in like manner, has no right over this peculiar, which is in every reſpect rendered ſimilar to the camp peculiar. When the ſon is abſent, or is not in a condition to manage his own affairs, the father is the adminiſtrator of them in law.

§ 68.

From what has been juſt eſtabliſhed, it follows, that the action for the peculiar takes place only with reſpect to the profectitious peculiar, and by no means with reſpect to the adventitious and camp peculiars. (See § 44.) So the ſon alone can ſue, and be ſued on account of the affairs which he has tranſacted in regard to thoſe peculiars, for which there lies no action againſt the father.

* Ex militia togata.

ART.

ART. V.

Of the rights of a mother with regard to her children, and thoſe of children with regard to their mother, ariſing both from the family-ſtate.

(De jure matris in liberos, et liberorum in matrem.)

§ 69.

IT has been obſerved, that the wife grants her huſband power over her body, with intention to have children by him, to perpetuate the family after his death.

Whence it follows, that the children are properly under the power of the father, and not under that of the mother; and that ſhe has as little right over them, as one who lends his ground to another, to make his ſeed bring forth fruit in it, has over the fruits which it produces. So it is not without foundation that the Roman laws ſay, *quod pater liberos jure ſeminis vindicet. l.* 1. § 1. *Inſp. ventr.*

§ 70.

This is the reaſon that a wife, who enters into her huſband's family, and conſents to live under his power, cannot lay claim to the privileges which he enjoys.

Nevertheleſs, as, on one hand, the mother is the companion of her huſband who is the head of the family; and on the other, the children are a real portion of her body, thence ariſe ſeveral rights of the mother over her children, and of the children over their mother.

§ 71.

In fact, the mother, 1.) Enjoys, next after the father,

ther, the right of commanding her children, who are bound to obey her; and ſhe has authority to chaſtiſe moderately, ſuch as are diſobedient.

2.) The children are likewiſe obliged to honour her, and to do nothing which may hurt her reputation.

3.) The mother ſucceeds her children inteſtate jointly with the other members of the family, and cannot be omitted in their wills, nor diſinherited without a juſt cauſe.

4.) Children cannot marry without their mother's conſent, and the want of that conſent renders the marriage null. (See above, § 21.)

5.) The mother is, after the father's death, guardian in law of her own children, even though the grandfather by the father's ſide ſhould be ſtill alive.

6.) When the mother is poor, the children are obliged to maintain her; and when ſhe dies without leaving effects, they are bound to get her buried at their own charge.

7.) As to illegitimate children, the rights which the mother has over them, ſhall be treated of in the ſecond book.

§ 72.

From the family-ſtate, likewiſe, ariſe ſome rights in favour of children with reſpect to their mother.

1.) She is obliged to provide them maintenance,

2.) And to take care of their education, jointly with their father.

3.) Children ſucceed their mother inteſtate,

4.) And can neither be paſſed by, nor,

5.) Diſinherited by her, without juſt cauſe.

6.) When grown children are in want, and the father is not in a condition to afford them neceſſaries, the mother is obliged to maintain them out of her own fortune.

7.) And to get them buried at her own charges.

All

All theſe privileges belong likewiſe to the children born of what is called a left-hand marriage.

ART. VI.

Of the reciprocal rights which other relations acquire over one another, by virtue of the family-ſtate.

§ 73.

COgnation or kindred is a general expreſſion, which comprehends all thoſe who are deſcended of the ſame ſtock, whether by the male or female ſide.

§ 74.

Thoſe who deſcend from the ſame ſtock, are divided into *agnats*, who are thoſe deſcended of the ſame ſtock only by males; and into *cognats*, properly ſo called, who are deſcended by the ſame ſtock only by females.

§ 75.

This diſtinction is attended with different privileges. For there are ſome rights which belong only to agnats, others which relate only to cognats, and others which equally concern both.

§ 76.

I. Agnation takes place only by lawful marriage. Wherefore children born of a left-hand marriage, or of an unlawful conjunction, are not reckoned agnats, neither do they enjoy the rights of agnation; but cognation is contracted even by an unlawful conjunction.

II. Agnats alone bear the name and arms of the family, and enjoy all the privileges and honours annexed to it.

Cognats, who by females are deſcended of the

common ſtock, or head of the family, can have no ſhare in its rights, becauſe the mother left the family to enter into another.

III. The agnat alone ſucceeds to the feoffments in truſt, and to the fiefs of the family.

And cognats are entirely excluded from them, except in the caſe of a feoffment in truſt, which had not been granted to the *family*, but in general to the cognats or neareſt relations, or in the caſe of a female fief.

IV. When a perſon independent of paternal power is adopted, he acquires only the rights of agnation, and not thoſe of cognation, unleſs he were adopted by an aſcendant; and this would alſo take place with regard to one, who being ſubject to the paternal power, ſhould alſo be adopted by an aſcendant. (See above, tit. IX. art. I. § 10. n. VIII. & IX. and ibid. § 12.)

V. 1.) Agnation ceaſes by the puniſhment of the ban or of proſcription;

2.) By the loſs of the freedom of a city, or borough;

3.) And by the loſs of the quality of member of a family.

Cognation ceaſes likewiſe indeed in thoſe three caſes, but only with regard to the advantages. Thus, none of the cognats, in the circumſtances mentioned, ſucceed to a relation who died inteſtate; but as to the precepts which regard cognation, or the ties of blood and nature, they ſubſiſt in their full ſtrength. Thus, one who is proſcribed, or has loſt the rights of a freeman, or is adopted by an aſcendant, cannot marry within the forbidden degrees. Thus, if he kills his father or mother, he is puniſhed as a parricide, &c.

§ 77.

The rights and privileges which belong equally to agnats and cognats, are the following:

1.) They

1.) They ſucceed to one another in the allodial effects, when they are born of a lawful marriage, except in the caſes mentioned in the foregoing articles.

2.) They are obliged reciprocally to defend each other.

3.) So they cannot omit accepting the guardianſhip of a relation under age.

4.) They may appear in judicatures for one another, even to the third degree, without a mandate, on giving ſecurity that their deed ſhall be ratified.

5.) When one of them has ſuffered any affront or injuſtice on account of the family from which he is deſcended, all the other relations have a right to proſecute for the injury done to the family.

6.) When a brother excludes from his ſucceſſion his own brothers, and appoints for his heirs perſons diſhonoured by their crimes, or of bad fame, the brothers may make the objection of *undutifulneſs*, for getting the will annulled, with reſpect to the undutiful ſettlement, which cannot be extended to the other relations.

§ 78.

If any one deny another's being a relation, and refuſe him the rights annexed to kindred, he whoſe family-ſtate is diſputed, may be defended by a prejudicial or preparatory action, and oblige the objector to acknowledge him for a relation, and allow him to enjoy the rights annexed to the family.

§ 79.

It ſhall afterward be declared, within what degrees relations may intermarry.

BOOK II.

TITLE I.

Containing the ſummary of this ſecond book.

§ 1.

WE have declared, part I. book I. title IX. art. I. § 4. & 5. that the paternal power is chiefly obtained by a lawful marriage. Not to interrupt the ſubject of paternal power, we referred to another place the explication of what is to be underſtood by a lawful marriage, and what rights and privileges it carries along with it: and this is what we are here to explain.

§ 2.

As promiſes and betrothing uſually precede marriage, we ſhall treat firſt in title II.

Of promiſes of marriage, or betrothing.

(De ſponſalibus.)

§ 3.

And afterwards in title III.

Of marriage itſelf, de nuptiis. On which occaſion will be ſhown,

a) How marriages are diſſolved, art. I.

b) When

b) When ſeparation from bed and board takes place, art. II.

c) And how far concubinage is allowable, art. III.

§ 4.

Beſides, as there are ſcarce any marriages without making ſome marriage-articles, we ſhall treat in general, in title IV.

Of marriage-articles, or *dotal agreements.*

(De pactis dotalibus.)

a) And in particular of the dowery, and its privileges. There ſhall be explained how, and by whom, the dowery may be redemanded after the conſummation of the marriage, and what charges the huſband may deduct from it. Art. I.

b) Of the *paraphernalia*, and of thoſe effects of which the wife reſerves the adminiſtration to herſelf, called *receptitia*. Art. II. & III.

c) Of the marriage-preſent. Art. IV.

d) Of the jointure or dowery. Art. V.

e) Of the preſent made to the wife the day after the marriage, called *morgengabe*. Art. VI.

f) Of the ſucceſſion of the huſband and wife, ſo far as it is ſettled by the contract of marriage. Art. VII.

g) Of the portion regulated by ſtatutes, called *ſtatutaria*.

§ 5.

As it frequently happens that a father, during his own marriage, or after it is diſſolved, or the agnats after the father's death, will not acknowlege the children as lawful, nor furniſh them maintenance or neceſſary ſupport, we ſhall treat in title V.

Of

Of acknowledging children.

(*De agnoſcendis liberis.*)

And in title VI.

Of the obligation of parents to maintain their children.

(*De alendis liberis.*)

At the ſame time, it is there declared, in what caſes one is bound to maintain others beſides their own children.

§ 6.

And as it often happens, that women who have loſt their huſbands, or are ſeparated from them, aſſert, that they are with child, and at other times deny it out of hatred to the huſband; in title VII. are ſhown the precautions, which perſons, having intereſt in the matter, may take to be aſſured of the truth.

Of the inquiries into ſuſpected pregnancies, and the precautions to be taken for the preſervation of the child.

(*De inſpiciendo ventre et cuſtodiendo partu.*)

TITLE II.

Of betrothing, or *eſpouſals.*

(*De ſponſalibus.*)

§ 1.

BEtrothing, affiance, or eſpouſals, is a mutual promiſe made by two perſons to marry each other. There muſt then be a real engagement on both ſides;

a ſimple courtſhip or conference about marriage does not conſtitute betrothing, or eſpouſals.

§ 2.

Theſe promiſes of future marriage do not conſtitute marriage, even though they ſhould uſe words applicable to the preſent time *; as, *I take you for my wife.* For as long as the marriage-ceremony, or carnal intercourſe do not intervene, they will only be reckoned promiſes of future marriage; on which account our will is, that the diſtinction of promiſes into preſent and future be entirely aboliſhed.

Whence it follows, that between perſons who are merely promiſed, neither the rights of the dowery or marriage-portion, nor the donation in proſpect of the marriage, take place; that theſe perſons cannot demand the portion of the ſucceſſion between huſband and wife, regulated by the ſtatutes of the country †; and that they do not commit adultery by a carnal correſpondence with another. Theſe promiſes form neither cognation nor affinity; and though they be made by words *applicable to the preſent time*, they may be annulled, like other promiſes and eſpouſals, for the cauſes which ſhall afterward be aſſigned.

§ 3.

Betrothing or eſpouſals are either public or clandeſtine. To render eſpouſals public, it is requiſite, that they be made on both ſides with the conſent of the relations, whoſe approbation the children muſt have in order to marry, (See below, § 18.); or, when there are none of theſe relations, in preſence of two unexceptionable witneſſes.

Thoſe who intermeddle in bringing about the marriage, as well as the relations aſcending and collate-

* Verbis de præſenti. † Portionem ſtatutariam.

ral,

ral, may be witneſſes, provided they be of unblameable behaviour: as for the reſt, it is of no conſequence, though the witneſſes be called only by one of the parties.

Eſpouſals are reckoned clandeſtine when they are concluded without the conſent of the relations mentioned, or are not made before two unexceptionable witneſſes, when the parties have no longer any ſuch relations.

When carnal correſpondence happens after public eſpouſals, the marriage is finiſhed and conſummated, though there be neither proclamation of bans nor nuptial benediction; and indeed, the wife and children have all the rights conſequent upon a lawful marriage; excepting that the wife cannot claim what is granted her by the donation in proſpect of the marriage, nor the dowery or jointure, nor the portion of ſucceſſion between huſband and wife, regulated by the ſtatutes of the country, but ſhe is to content herſelf with the reſtitution of her marriage-portion. When the carnal correſpondence happens after clandeſtine eſpouſals, the marriage is not thereby completed; it is unlawful conjunction, which ſhall be treated of in its place.

§ 4.

Eſpouſals are further of two kinds; for they are contracted either purely and ſimply, without any condition added to them, or they are contracted conditionally.

They are likewiſe reckoned contracted purely and ſimply, when the one ſays to the other, *I will wed you, and will eſpouſe no other.* One who makes ſuch a promiſe is bound to fulfil it; and the perſon to whom it is made, ought not to expect to make ſuch a promiſe elſewhere, or to form a deſign of wedding another.

But if one ſhould ſay, *When I ſhall wed, it ſhall be with you, and I will not eſpouſe any other*; he would not be bound

bound to complete the marriage as long as he did not promiſe himſelf to another; and ſhall not have declared by ſo doing, that the condition under which he had engaged, exiſts, that is to ſay, that he intends to marry.

§ 5.

The concluſion of marriage is ſuſpended by the condition added to the eſpouſals, whether it be in the power of thoſe who promiſe to each other, or be caſual or mixed; and the two contracting parties are obliged to wait the event of the condition, and cannot in the mean time retract their engagements.

§ 6.

If the condition added to the eſpouſals be impoſſible in the nature of the thing, or becauſe it is contrary to the laws, or if it contain any thing diſhoneſt, or give occaſion to ſin; the promiſes of marriage are null. If, for example, one promiſe to marry on condition that he ſhould change his religion, or not perform the conjugal duty to his wife, or not have children, &c. none of the contracting parties ſhall be bound to perform ſuch promiſes.

§ 7.

Where the condition is neceſſary, and is neceſſarily to happen, ſuch promiſes are not to be regarded as conditional. Such agreement is pure and ſimple.

§ 8.

All the conditions (even thoſe which are impoſſible or diſhoneſt) are reckoned as fulfilled,

1.) When, before the exiſtence of the condition, the parties have had carnal correſpondence together.

2.) Or when they renounce the condition with common conſent.

3.) When the perſon in whoſe favour the condi-

tion is added, declares a willingneſs not to take advantage of it. Thus, when a man has promiſed marriage to a girl, on condition that the bride's father ſhall previouſly give her a thouſand rix-dollars; ſhe ought to be obliged to marry him, if the bridegroom conſents to marry her without exacting the thouſand rix-dollars.

§ 9.

When a condition ſhall depend on the will of one of the contracting parties, and the other ſhall have waited in vain for a certain time, the judge may, in equity, fix the time at which the perſon on whoſe will the condition depends, ſhall be obliged to fulfil it, and to conclude the marriage.

If the condition were caſual or mixed, and did not exiſt through the fault of one of the contracting parties, that one ſhall be bound to conclude the marriage, without the neceſſity of waiting till the condition exiſt.

§ 10.

There are ways of being engaged, which tacitly contain promiſes of marriage, namely when * the condition ſuppoſes the marriage. For example, when one of the parties promiſes, at the other's deſire, to buy an eſtate, or to build a cellar, after the celebration of their marriage, they are both validly engaged.

Theſe ſort of engagements include no condition for concluding the marriage, and conſequently cannot ſerve as a pretext to hinder its concluſion. Nevertheleſs, the perſon who added thoſe clauſes, may exact of the other a ſecurity for fulfilling them.

If, after the marriage, he neglect to fulfil his engagements, he may be obliged to it by law.

* Sub modo.

§ 11.

§ 11.

Promiſes of marriage may alſo be made for a ſtated time *; for example, *I will marry you as ſoon as I am thirty years old, or after my father's death.* In ſuch a caſe the promiſes are not conditional, becauſe it is certain that time ſhall come. Nevertheleſs, the other cannot exact the concluſion of the marriage, till that time be really come.

§ 12.

That eſpouſals or promiſes of marriage may be valid, it is requiſite that both parties conſent to them, and declare freely and plainly their intention of being married together.

Thence it follows,

a) That thoſe who have not the uſe of reaſon, cannot promiſe themſelves. Among theſe are comprehended ſuch as were in liquor at the time of their promiſes; but they ſhall be obliged to revoke them by writing, within the term of eight days.

b) A conſent cannot be regarded as voluntary, when the parent or guardian of one of the parties have conſtrained them, by ſtrong threatenings or hard uſage, to promiſe themſelves.

But when the parents, by wiſe remonſtrances, ſhall engage their children to promiſe themſelves, and the children ſhall conſent, out of reſpect to their parents, the eſpouſals ſhall be valid.

c) Neither is there any conſent, when the parents promiſe their children, or order them in their teſtament to marry with perſons therein named. And indeed the children are not obliged to execute their parents will in that reſpect. And if they have been reduced to the legitim or ſhare that a child has by law in caſe of diſobedience, our will is not, that theſe ſettlements be valid, far leſs do we allow the execution

* Sub die.

of the penalties which the teſtator may have annexed to their diſobedience.

In fine, one cannot regard as a conſent, the ſportive toying of a man, who, in a company of ſeveral perſons, calls a woman his bride; or that of a woman, who, having the uſe of her reaſon, makes a ſimple man believe that ſhe will marry him, and even gives him, as there are ſome examples of this, a copper-ring. But in this laſt caſe, our will is, that ſuch as make a joke of ſo grave a ſubject, be ſeverely puniſhed.

§ 13.

One may promiſe himſelf by ſigns; wherefore one who is born dumb may alſo promiſe himſelf.

As to one who is born deaf and dumb, the judge muſt firſt examine whether he has an idea of promiſes of marriage, and of the affairs which are tranſacted among men. But with reſpect to one who being deaf and dumb, is beſides blind, no conſent can be ſuppoſed on his part.

§ 14.

When a woman, whoſe conſent a man has aſked in order to be married with her, makes the ſign with the head which denotes approbation, and accepts the ring, or the handkerchief, or the money, &c. offered on that occaſion, the promiſes are as valid as if they had been given by word of mouth.

§ 15.

One may alſo tacitly give a conſent, which happens, when the parents agreed between themſelves on a marriage, aſk their children if they conſent to it, and the children neither anſwer by word of mouth nor by ſigns. In caſe their intention was not to conſent to the marriage concluded by their parents, they muſt make it known within the ſpace of fifteen days, either

ther to the judge or to their parents, who ſhall immediately inform the perſons concerned.

§ 16.

Eſpouſals may alſo be contracted between abſent parties, by letters, or by an attorney furniſhed with ſufficient powers. But in this laſt caſe, a blank ſchedule ſigned, is not ſufficient, and it muſt at leaſt contain an order to contract eſpouſals with ſuch a perſon by name.

§ 17.

II. That eſpouſals may be valid, it is alſo requiſite, that the betrothed perſons be of the age fixed by the laws, which is twelve years for the woman, and fourteen for the man. If either, or both, were not of the age required, the promiſes would be null, unleſs they were afterwards publicly renewed.

§ 18.

III. To render eſpouſals valid, it is likewiſe neceſſary, that the relations on both ſides conſent to them freely, and that this conſent be not got by ſurpriſe or fraud.

If, then, any one betroth himſelf without the conſent of his father, or of his mother, in caſe his father be dead; or of his grandfather by the father's ſide, in failure of his father and mother; or of his grandmother on the father's ſide, if the grandfather be deceaſed; or of his grandfather on the mother's ſide, in failure of the paternal aſcendants; or of the grandmother on the mother's ſide, when the maternal grandfather is no longer alive; the promiſes of marriage ſhall be null, ſuppoſing even theſe promiſes had otherwiſe been lawfully contracted.

The conſent of the relations ſhall be requiſite,

a) When they ſhall have fallen into extreme indigence, as well as

b) When

b) When the children ſhall no longer be at their father's table, but keep a ſeparate houſe; or,

c) When they ſhall poſſeſs eminent dignities; or

d) Even though they ſhall be adopted by a ſtranger.

The conſent is not reckoned as given, when the father and ſuch other aſcendant, whoſe conſent is requiſite, have merely a knowledge of the eſpouſals; but the children muſt aſk the conſent, and wait till it be expreſsly given, or till it be ſupplied by the judge when it is refuſed without a ſufficient reaſon. See § 22. below.

If the relations above mentioned afterwards approve the eſpouſals, or even marriage, contracted without their conſent, both theſe eſpouſals and marriage ſhall be valid, from the time of their being contracted.

§ 19.

What is ordered with reſpect to the conſent of the natural father, takes place alſo with reſpect to fathers who are ſuch by adoption if they be aſcendants.

But with regard to one adopted by a ſtranger, if he marry without the conſent of the adopter, he loſes the right of ſucceeding to him.

§ 20.

The parents ſhall be mindful to provide their children ſuitably, when they are of an age to be married; leſt, by making unſeaſonable obſtacles to their ſettlements, they ſhould occaſion them to contract unlawful promiſes of marriage, and to engage themſelves into criminal correſpondences.

§ 21.

When children want to marry with perſons upon whom they may have views, and apply to their parents to obtain their conſent, the parents ſhall not oppoſe

oppoſe it, unleſs they have good reaſons for ſo doing. Want of fortune or inequality of condition and birth, ſhall not ſingly by themſelves be ſufficient reaſons for refuſing their conſent, if they be not ſupported by other reaſons more important.

Nevertheleſs, if one or other of the betrothed perſons be ſo deſtitute of fortune, that they could not live together according to their condition or ſtation, nor provide for the neceſſities of their children after the death of either; or if either were of a birth entirely abject; or were, beſides, of a bad behaviour, and were reckoned a debauched perſon, a gameſter, a drunkard, &c. theſe reaſons would be ſufficient grounds for the relations to oppoſe ſuch a marriage.

§ 22.

In caſe the parents perſiſt in oppoſing the marriage of their children, the latter ſhall apply to our judges, who, after having tried without effect the method of accommodation between the parties, ſhall give ſentence upon their differences; and ſhall, by virtue of their office, according to circumſtances, ſupply the conſent of the parents, and allow the children to conclude the marriage.

Our judges ſhall not fail, in this laſt caſe, to inſert in their decrees, that the two contracting parties ſhall not thereby be leſs bound to reſpect their parents, to love them, and to pay them all due obedience.

But if our judges ſhould find the reaſons of refuſal important and well founded, they ſhall not ſupply the conſent of the parents; on the contrary, they ſhall declare the eſpouſals null.

§ 23.

If it happen that children, to whoſe marriage their parents, or in failure of them their guardians, will not

not conſent, the more eaſily to attain their own end, ſhould reſolve to live with the perſon to whom they are contracted as man and wife, and even ſhould get themſelves married clandeſtinely; our pleaſure is not, that either the parents, or the guardians be obliged, on that account, to give their conſent to the marriage, but they ſhall have liberty to apply to the *conſiſtory* to get it annulled; and if it be declared null, a man who has debauched a girl, ſhall be bound to portion her, for having deflowered her, and to contribute to the education of the child which ſhe may have by him; all in proportion to his fortune, and according to the nature of his circumſtances.

But if the parents ſhould be unwilling to ſue for annulling the marriage which their children have contracted againſt their conſent, they ſhall be at liberty to diſinherit them, and deprive them of their legitim. Moreover, our pleaſure is, that thoſe who ſhall contravene what is here preſcribed, be condemned in a fine, or puniſhed by impriſonment.

§ 24.

If any one ſhall falſely affirm, that he had the conſent of his parents, and produce forged letters, the promiſes ſhall, indeed, be null; but the perſon guilty of the fraud, ſhall be bound, in proportion to his fortune, to indemnify the innocent party for the wrong done, and ſhall beſides be corporally puniſhed.

If, under this pretext, a man had induced his bride to allow him carnal knowledge of her, or had got the marriage celebrated, and that the parents, as they are authoriſed, ſhould require it to be annulled, he ſhall not only portion the wife, in proportion to his means, but ſhall beſides be puniſhed as a forger, according to the rigour of the laws.

§ 25.

When the parents, whoſe conſent is requiſite, or one

one of them, ſhall once have given their conſent to the marriage of their children, they cannot revoke it, unleſs they have new reaſons for doing ſo; of which, at any rate, our judges ſhall take cogniſance.

When a ſon or a daughter ſhall have promiſed themſelves without the conſent of their parents, and ſhall revoke the engagement into which they entered, the other party to whom ſuch perſon is engaged, cannot ſue the parents in order to have their conſent ſupplied, nor exact the penalty upon which the parties had agreed in caſe of a revocation; but the proceſs muſt be immediately diſmiſſed.

§ 26.

The conſent of relations is not requiſite,

1.) When they are abſent, and the place of their abode is not known;

2.) When they have not the uſe of their reaſon;

3.) When children who had contracted a firſt marriage with the conſent of their parents, incline, after the death of their firſt ſpouſe, to marry a ſecond time. In this caſe there is nothing but decency which obliges a child to aſk the advice and conſent of parents; provided only that the marriage be with a perſon of honour, and whoſe ſtation is not very unequal.

Moreover, this is underſtood, that when the father is abſent or fatuous, the mother's conſent muſt be aſked, or the conſent of the other aſcendant relations, according to the gradation mentioned in § 18. above.

§ 27.

All that has been ordered with reſpect to the conſent of relations, ſhall take place with reſpect to guardians and curators. Thus, when a minor promiſes himſelf without the conſent of his curator, and the latter has valid reaſons for his oppoſition, the judge

ſhall take cogniſance of the cauſe, and according to circumſtances ſhall annul the promiſes, even though carnal correſpondence ſhould have intervened. But what has been ſaid of parents, who may diſinherit their children in ſuch caſes, cannot take place with reſpect to guardians and curators.

§ 28.

With regard to thoſe who have no relations, whoſe conſent they are obliged to aſk, and who are of age; it is requiſite, for rendering eſpouſals public, that they be performed in preſence of two reputable witneſſes; in default of which they ſhall be held as clandeſtine, and ſhall not bind any of the contracting parties, unleſs they be reiterated, or declared in preſence of two unexceptionable witneſſes.

But if one who has no relations, whoſe conſent is requiſite, and who being neither under guardianſhip nor curatory, is maſter of his own rights *, ſhould ſeduce an honeſt girl under promiſe of marriage, even though public eſpouſals have not preceded; it is neceſſary that the girl ſhould, nevertheleſs, bring good proof of the promiſes of marriage; and if ſhe cannot bring proof of them, ſhe ſhall be regarded only as a concubine.

§ 29.

In the ſecond place, it is requiſite, to render eſpouſals valid, that the promiſe be made only with one ſingle perſon. If any one promiſe to two, the one of the two promiſes is null; but the queſtion is to know to which of the two the preference muſt be given.

§ 30.

To reſolve this queſtion, the following caſes muſt carefully be diſtinguiſhed.

* Sui juris.

1.) When

1.) When one has promiſed publicly to two perſons.

2.) When the two promiſes are both clandeſtine.

3.) When one has promiſed clandeſtinely to one perſon, and afterwards publicly to another. And,

4.) When one has promiſed publicly to one perſon, and afterwards clandeſtinely to another.

§ 31.

In the firſt caſe, when one has promiſed publicly to two perſons, the firſt eſpouſals are alone valid, even though the laſt were confirmed by an oath, or though the firſt were ſtill ſuſpended by a condition. Nevertheleſs, if the firſt bride renounce her right, or the laſt promiſe were followed by carnal correſpondence, or by the nuptial ceremony and benediction, in theſe caſes they would get the preference, becauſe by carnal correſpondence, or by the nuptial benediction the marriage would have been completed.

1.) If any one promiſes himſelf publicly to two perſons, and gets them both with child, the promiſes made with her who is firſt got with child, ſhall have the preference; becauſe by the carnal correſpondence the marriage has been effectually conſummated.

But if ſhe renounce her right, or if otherwiſe, the marriage could not take place, the ſeducer ſhall be bound to the ſecond bride, and obliged to marry her, in ſpite of any thing that he might allege in order to be diſpenſed from it.

2.) When a woman promiſes herſelf publicly to two men, and one of the claimants is afraid that the other carry her off, or obtain the preference by means of carnal correſpondence, the judge may either ſimply iſſue prohibitory letters, or even put the woman into the cuſtody of known honeſt people.

But if, notwithſtanding the prohibition, the woman be carried off, and the raviſher proceed to carnal

correſpondence, the eſpouſals ſhall be null and without effect; conſequently the children ſhall be reckoned baſtards, and the contraveners ſeverely puniſhed. As to the perſon complaining of this, if the priority of their promiſes be proved, and if the other betrothed perſon will not fulfil them, the half of the goods of the contravener ſhall be adjudged to the complainer, and he or ſhe ſhall be put in poſſeſſion of their effects till the deciſion of the cauſe.

3.) As it is an unlwful thing, and quite unworthy of an honeſt man, to promiſe himſelf to two perſons; we have, after mature deliberation, enacted and ordained, that he who ſhall make public promiſes of marriage to two perſons, ſhall be eſteemed in law infamous, and, beſides, proſecuted by our fiſcal to be exemplarily puniſhed.

And as for the woman who ſhall be obliged to deſiſt from her claims, and who ſhall have been entirely ignorant of the firſt promiſe, ſhe ſhall not only keep the preſents which ſhe may have received at promiſing herſelf, and all that the other party may have given her otherwiſe; but ſhe may likewiſe redemand thoſe made by her, and ſhall gain at the ſame time the third part of all the effects of the adverſe party. If ſhe have been got with child, the bridegroom would be bound beſides to maintain the child, according to his own rank, all the time of its life.

4.) When diſputes ſhall ariſe about priority of promiſes, they ſhall not be decided by the aſſertions of the perſons concerned; but thoſe who found on priority, ſhall be bound to prove it.

§ 32.

In the ſecond caſe, when any one promiſes clandeſtinely to two perſons, the eſpouſals are null; ſo that even, though they were accompanied with carnal correſpondence, the marriage would not thereby be

be completed. Which nevertheleſs is only to be underſtood of promiſes which are clandeſtine for want of the conſent of parents, and not of thoſe which are contracted by perſons, who being maſters of their own rights, promiſe themſelves without witneſſes. For, in this caſe, the clandeſtine promiſe is changed by the carnal correſpondence into a lawful marriage, which the ſeducer is obliged to get celebrated.

1.) When one who is maſter of his own rights *, ſhall have made clandeſtine promiſes to two perſons, and ſhall have got them both with child, he ſhall be bound to marry her who was firſt got with child; but ſhe who ſhall be obliged to deſiſt from her claim, ſhall not only gain the preſents which have been made her, and get reſtitution of thoſe which ſhe has given; but he ſhall likewiſe be obliged to give her a portion, and to maintain the child as long as it lives; and in this it is, that theſe women differ from concubines.

2.) The puniſhment of infamy does not take place againſt thoſe who engage in two clandeſtine eſpouſals, but it ſhall be ſufficient to inflict upon them an arbitrary puniſhment.

§ 33.

In the third caſe, when a man who is maſter of his own rights, engages with one perſon clandeſtinely, and afterwards publicly with another, the laſt eſpouſal ſhall be preferred, unleſs the firſt were accompanied with carnal correſpondence, or confirmed by the nuptial ceremony and benediction.

§ 34.

In the fourth caſe, when one promiſes himſelf at firſt publicly to one perſon, and afterwards privately to another, the laſt eſpouſals are without doubt invalid, unleſs in a queſtion with a man who is maſter of his own rights †, the promiſe were confirmed by

* Sui juris. † Sui juris.

carnal

carnal correſpondence, or by the nuptial benediction, which would get them preferred to the firſt, as has been decided in the preceding article.

§ 35.

By lawful eſpouſals, the two contracting parties acquire the action ariſing from a covenant *, in virtue of which, each of the parties may demand, that the other who will not fulfil the promiſe, be obliged to complete the marriage, and get it celebrated.

§ 36.

In caſe that one who has been condemned by the judge to fulfil the promiſe of marriage made, refuſe to get the marriage celebrated, the following gradation ſhall be obſerved.

1.) He ſhall firſt be exhorted by his paſtor to fulfil his engagement.

2.) If ſuch exhortations are ineffectual, he ſhall be put in priſon.

3.) If, after a long impriſonment, he perſiſt in his refuſal, the promiſe ſhall be annulled; becauſe it is dangerous to join perſons, who, according to all human appearance, will never agree.

But in this caſe, one who ſhall fail in his engagements,

a) Shall reſtore all that he has received;

b) Shall pay all the charges;

c) Shall deliver to the other party the half of his fortune, which he ſhall be obliged to diſcover upon oath;

d) And till he ſhall have performed all that is now preſcribed, he ſhall not be releaſed from priſon, not even by giving ſecurity.

e) But if he had little or no fortune, and were reduced to gain his livelihood by the labour of his

* Actionem ex pacto.

hands,

hands, a certain penſion ſhall then be determined, which he ſhall be bound to pay to the perſon to whom he breaks his word, as long as he lives, and that under pain of impriſonment.

4.) This is only to be underſtood of the caſe, in which the eſpouſals are not accompanied with carnal correſpondence; for if there were carnal correſpondence between the betrothed perſons, and thereby the marriage were contracted and really conſummated, it ſhall be celebrated without the neceſſity of previous proclamation of bans: and if he who will not fulfil his engagements, refuſe to give his conſent by words, or if he happen to run away, or not to appear upon the ſummons, his conſent ſhall be ſupplied by an officer of the exchequer or revenue, who ſhall give it in his name, and his wife, and child, if there be one, ſhall have appointed for them a neceſſary maintenance out of the huſband's effects. But if he gains his bread by his labour, the penſion which he muſt give ſhall be determined; which ſhall be exacted by way of execution, without its being allowable to uſe the leaſt connivance.

5.) Before celebrating in this manner the marriage of a widower or widow, the affairs of the children of the firſt marriage muſt previouſly be regulated; and till that be done, he who refuſes to fulfil his promiſe, ſhall continue in priſon.

§ 37.

Public eſpouſals may be diſſolved, either on account of nullity, or for other important cauſes.

§ 38.

Eſpouſals are invalid and infer no obligation,

1.) When the two parties have not conſented to them, (ſee § 12. of this title); or when there is an error with reſpect to the perſon. Ibid.

2.) When

2.) When one of the two parties has not attained the requiſite age. See § 17.

3.) When the conſent of parents and guardians is wanting. § 27.

4.) When thoſe who are maſters of their own rights * do not promiſe themſelves in preſence of two witneſſes, reckoned honeſt people, or do not declare promiſes in their preſence. See § 28.

5.) When one has already publicly promiſed to another. § 31.

6.) When the condition under which the eſpouſals were made, does not exiſt, or is impoſſible, or even is contrary to good manners. (See § 6. & 8.)

7.) When thoſe who have promiſed are relations within the degrees prohibited. See the following title.

8.) When one of the parties is not fit for marriage, and the other was ignorant of it.

9.) When a woman, who proves the death of her abſent huſband in a proper way, promiſes herſelf to another, and the huſband nevertheleſs returns afterward.

10.) When a man in a ſervile condition promiſes himſelf to a woman who is free, and has no knowledge of his ſtate. See the following title.

11.) When the eſpouſals are contracted with a perſon who is of none of the three religions tolerated in the empire; as, for example, if one promiſed himſelf to a Jeweſs.

12.) When married perſons promiſe to marry a perſon for a ſecond marriage, ſuppoſing their ſpouſe comes to die before themſelves. In this caſe, none of the contracting parties can be bound to fulfil their engagements after the death of the ſpouſe, even

* Sui juris.

though,

though while alive, there had been carnal correſpondence between them.

The ſame thing ſhall take place, when married perſons are at law together, and demanding to be ſeparated. If, while the cauſe is yet depending, either of the parties ſhould promiſe to another perſon, ſuch eſpouſals are likewiſe invalid.

1.) If, then, any one ſhould found upon ſuch promiſes, in order to intent an action againſt another, his ſuit is to be diſmiſſed. And if, notwithſtanding the prohibition of the laws, thoſe who are in the caſes mentioned in numbers 2. 3. 5. 7. & 11. want to finiſh their marriage, our officers of the revenue, who may get account of it, ſhall interpoſe to prove the nullity of the eſpouſals, and to inſiſt, that the contraveners be condemned to the puniſhment which they have incurred.

2.) In all the above-mentioned caſes, the preſents made on either ſide ſhall be reſtored. From this are to be excepted the caſes mentioned in numbers 5. 8. & 10. in which they are adjudged to the innocent party.

§ 39.

Lawful eſpouſals may likewiſe be diſſolved for ſeveral cauſes, which we are now to enumerate.

1.) When the contracting parties revoke the eſpouſals by common conſent, and make a declaration of it before a judge. Which they may do, even though their promiſes were confirmed by an oath. Eſpouſals are diſſolved,

2.) By the natural death of either of the parties, and by their civil death, when either is forfeited or proſcribed.

3.) When there happens a profeſſed enmity between the betrothed perſons, cauſed, 1. Either by bad treatment, or atrocious abuſive language, &c. uſed either againſt the perſon complaining, or againſt

the father, and mother, and brothers of the complainers; or, 2. By the knowledge which one of the eſpouſed perſons gets of the other's character; as if the one underſtood that the other were a drunkard, or a profeſſed gameſter, &c.

4.) It is likewiſe regarded as a lawful cauſe of a profeſſed enmity, when one of the betrothed perſons lives in a criminal correſpondence with any other.

A diſtinction however muſt be made between the bridegroom and bride; for if the queſtion be concerning a correſpondence which happened before the eſpouſals, the bridegroom may require or reject the bride, but ſhe cannot do the ſame with her bridegroom. Our will is, even that the bridegroom may get the eſpouſals annulled, even though force had been employed to violate the bride, unleſs he had knowledge of it before promiſing himſelf.

5.) When one of the betrothed perſons commits, or has committed, an action diſgraceful in itſelf, as adultery, or robbery, &c. and the other had no knowledge of it before the eſpouſals, the latter ſhall have ſufficient reaſon to get them annulled; which ſhall take place, even though the law ſhould not puniſh the crime otherwiſe than by impriſonment, or though it had been entirely pardoned. With ſtill greater reaſon ſhall eſpouſals be annulled, if, by the judgment which paſſed, the guilty perſon had been condemned to a diſgraceful puniſhment, ſuch as whipping, chaining to a poſt, baniſhment, the wheelbarrow, impriſonment; if it were for being ſhut up in the houſe of correction, &c. and that even though he had obtained letters of pardon.

6.) Eſpouſals may alſo be diſſolved, when one of the betrothed perſons is, or has been ſeized with any venereal diſeaſe, with the epilepſy, or falling-ſickneſs; with the leproſy, or other contagious malady, and

and the other betrothed perſon had no knowledge of it.

7.) When one of the betrothed perſons loſes the uſe of reaſon, and that, after a term of two years, there is no hopes of a cure; as alſo, when, before the eſpouſals, the perſon has had ſuch diſorders of mind, and the other betrothed perſon knew nothing of them.

8.) When, after the eſpouſals, one of the betrothed perſons ceaſes, by ſome accident, to be fit for marriage.

9.) When one of the betrothed perſons loſes a hand, an arm, or a foot, and thereby becomes unfit to gain ſubſiſtence for the other, who is likewiſe deſtitute of ſubſtance.

10.) When any one, by himſelf, or by others, makes his bride, or her father and mother, believe, that he has a fortune, and it is afterward found that he is indigent, or even in debt, the promiſes may alſo thereby be annulled.

11.) It often happens, that, after eſpouſals, the bridegroom is obliged to make a voyage or journey; which gives occaſion to the queſtion, How long ſhall the bride be obliged to wait? It is paſt doubt, that when the bridegroom ſhall be abſent for ſome years, on affairs of the ſtate, or of the ſovereign, or in the army, the eſpouſals cannot be annulled on account of this long abſence.

Which is likewiſe to be obſerved, when the bridegroom ſhall abſent himſelf for ſome years on the management of his own affairs.

But when the cauſe of abſence ſhall come to ceaſe, and the public commiſſions, or private affairs of the bridegroom ſhall be ended, if he do not return to fulfil his engagements, the bride may demand a diſſolution of the eſpouſals. In like manner, if the bridegroom let two years paſs without writing, and

without giving his bride accounts of him, ſhe ſhall be at freedom to get the eſpouſals diſſolved, by applying for that purpoſe to the judge. This ſhall eſpecially take place, if the bridegroom's reſidence be unknown; in which caſe, however, it ſhall be neceſſary to cauſe him be ſummoned edictally, or by executing an edict, and to appoint an agent for him.

If the bridegroom return after the diſſolution of the eſpouſals, the bride ſhall not be bound to renew them, even though he ſhould think he could aſſign good reaſons for his abſence.

12.) If one of the betrothed perſons cannot be induced, either by gentleneſs or by impriſonment, to fulfil the public promiſes, it ſhall be lawful for the other to renounce them; reſerving a freedom to proſecute for the penalties incurred for non-performance. See above, § 36.

13.) Eſpouſals cannot, in any way, be diſſolved, under pretext that there is an error with reſpect to name, religion, nobility, or even riches, &c. unleſs the error happened by the fraud and falſehood of the bridegroom; as if he had declared, contrary to truth, that he is of the ſame religion as his bride, that he is noble, that he is rich, &c.

§ 40.

When the eſpouſals ſhall be diſſolved by the fault of one of the parties, that perſon ſhall reſtore to the other the preſents received, and ſhall not be authoriſed to redemand thoſe given. This ſhall take place, whether the cauſe of diſſolution exiſt before the eſpouſals, or happen after they have been contracted.

If the guilty party have received preſents, without giving any, the double of what has been received, ſhall be reſtored to the innocent.

This ſhall not be obſerved when the queſtion is with

with one under age, who may retract, or may be reponed or reſtored to his place againſt promiſes made in his minority; in which caſe, the preſents would be reſtored on both ſides.

When the eſpouſals ſhall be diſſolved, by reaſon that there are others preferable to them, the innocent party, who ſhall be obliged to deſiſt from their rights, may ſtill take advantage of what is ordained. § 32. and following.

§ 41.

When the eſpouſals ſhall be reverſed by the conſent of both parties, or when they ſhall be both found in fault, they ſhall mutually reſtore the preſents received.

§ 42.

In a queſtion againſt a father and mother, or guardians, who have promiſed the children committed to their care, without their approbation, and they cannot induce them to approve the promiſe, though they do all they can for that purpoſe; the preſents ſhall, in like manner, be reſtored on both ſides. But if the father, and mother, and guardians, ſhould themſelves retract, without any reaſon, and ſhould diſſuade the children to fulfil the promiſes, they ſhall incur the penalties enacted by § 40.

If, in the eſpouſals, a ſum be ſettled, in caſe of failure, it ſhall be paid by the party, who, without lawful reaſon, will not complete them; but ſuch party ſhall be bound to no other penalty, and may take back the preſents made, provided always thoſe received be reſtored.

If the father, or mother, or guardians, oppoſe eſpouſals, which they themſelves have concluded, and incur the agreed penalty, they ſhall be bound to pay, out of their own money, the ſum agreed for the failure,

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lure, and ſhall not place it to the account of the children.

§ 43.

It is moreover underſtood, that the guilty party is bound to indemnify the innocent party, of the charges and damages cauſed either by law-ſuits, or by the delay the guilty.

§ 44.

In fine, we will, and ordain, that any one, who, knowing a perſon to be of a ſcandalous life, nevertheleſs induces another to eſpouſe ſuch perſon, may be ſued for fraud, and obliged to make reparation.

TITLE III.

Of marriage, or nuptials.

(De nuptiis.)

§ 1.

MArriage is a conjunction of the huſband and wife, and the union of their bodies; which conjunction is made with an intention to form, during their lives, an indiſſoluble ſociety, to bear good and evil together; and, above all, to have children of each other.

Whence it naturally follows, that any other conjunction, for example, of a man with a man, of a woman with a woman, or of a perſon with a beaſt, is forbidden by nature itſelf.

We have already declared above, part I. book I. tit. II. 3. what is to be obſerved with reſpect to hermaphrodites.

§ 2.

§ 2.

It is not precisely requisite that the corporal conjunction actually take place; for it is sufficient that it may do so, if the married persons so incline; and they may do so after the nuptial ceremony and benediction.

If, then, one of the betrothed persons die before the nuptial benediction, the marriage shall not be reckoned completed, unless the espousals were confirmed by carnal correspondence. See the preceding title, § 3. § 31. and following.

§ 3.

To render a marriage lawful, it is requisite,

I.) That the two betrothed persons have attained the age requisite for marriage; which shall be fourteen years for women, and sixteen for men. In which we differ from the Roman laws, by reason that these laws were made for hotter climates, in which men arrive sooner at the age of puberty. It shall not be allowable to consummate marriage before that time; and, in case younger persons should publicly promise themselves, and have carnal correspondence, the marriage shall indeed be valid; but our will is, that they be punished arbitrarily, for having anticipated the time of the consummation of their marriage.

This we only mean of the case, where a bridegroom, who is past fourteen years of age, and a bride who is past twelve, have ratified the espousals by carnal correspondence. For, if that had happened before the said age of twelve and fourteen years respectively, the marriage would be invalid, if any of the promised persons inclined to desist from it.

§ 4.

II.) The consent of the two parties is necessary to render a marriage lawful; but this consent is not reckoned as given, if either be deprived of reason, or have

have been conſtrained to complete the marriage by ſtrong threatenings, or violent means. Conſult the preceding title, § 12.

§ 5.

III.) It is requiſite that marriage be contracted with the conſent of the relations mentioned in tit. II. § 18. and of the guardians. See the preceding title, § 18. and following, and § 27.

§ 6.

IV.) It is requiſite that marriage be contracted between one huſband only, and one wife only; wherefore one huſband cannot take two wives at a time, nor one wife two huſbands.

If any man, notwithſtanding this prohibition, ſhould marry two wives, or a woman ſhould marry two huſbands at a time, they ſhall be puniſhed, not only for the crime of adultery, but alſo for that of bigamy. In this caſe, moreover, the laſt marriage is null, and the ſecond huſband or wife ought to blame themſelves for not having taken proper informations at the dwelling place of the bigamiſt, and for not having cauſed proclamation of bans to be made there. Nevertheleſs, the bigamiſt ſhall be bound, not only to maintain the children of the ſecond wife, as long as they live, but even to portion herſelf.

§ 7.

But when the firſt marriage has been diſſolved, it is allowable for any one to have recourſe to a ſecond marriage.

Nevertheleſs, any one who inclines to marry again ſhall be bound,

1.) To prove, that the firſt marriage was diſſolved; for example, if a woman ſhould pretend that her huſband were dead in the army, or in a foreign country, and the thing were doubtful, ſhe would be obliged to produce

duce a proof of it. The manner of doing ſo has been explained in the Federician Code, part I. book II. title III. art. I. § 38.

2.) When a woman inclines to enter into a ſecond marriage, ſhe cannot do ſo till after the time of mourning; which we fix by theſe preſents to nine months.

If a widow marry again before the nine months are elapſed,

a) She ſhall loſe the portion which ſhe promiſed to her firſt huſband, or which ſhe really brought him at her marriage.

b) The children of the firſt huſband ſhall keep the donation on account of the nuptials, the dowery or jointure, the portion of the ſucceſſion, called *portio ſtatutaria*; and, in general, all that their mother had got from him, either by deeds taking place while alive, or by ſettlements in his laſt will; which is to take place, even though the children ſhould not be heirs of their deceaſed father, or though they were excluded from being ſo by ſome *ſtatute* *. If there be no child of the firſt marriage, all thoſe profits ſhall belong to the exchequer.

3.) A woman who ſhall thus marry again during the time of mourning, cannot diſpoſe, in favour of a ſecond huſband, any more than the portion which the child of the firſt marriage leaſt amply provided, ſhould inherit from her. Wherefore the ſtepfather ſhall be bound to reckon all that he has received from his wife, both during the marriage and by will; and if he be found to have received more, he ſhall reſtore it to the children of both marriages.

The children of the two marriages ſhall divide this ſurplus by equal portions, even though they had been appointed heirs to unequal ſhares.

4.) If a widow who is with child by her firſt huſ-

* Statuto.

band, marry again before ſhe be delivered, ſhe ſhall be put into the houſe of correction for three years, or otherwiſe ſhe ſhall pay the exchequer a fine of five hundred rix-dollars. If the ſecond huſband knew of it, he ſhall be put to the wheelbarrow for one year, or elſe he ſhall pay the ſame fine.

5.) Theſe penalties ſhall take place, even though that widow ſhould, by ſub and obreption, have obtained a diſpenſation to marry during the time of mourning.

6.) But if a widow could aſſign weighty reaſons which induced her to haſten her ſecond marriage, as for example, if ſhe were engaged in a very extenſive trade, we will not refuſe her a diſpenſation. Nevertheleſs, our will is, that in this caſe,

a) There be at leaſt ſix months elapſed, reckoning from the day of her ſeparation from her firſt huſband, or of his death:

b) That ſhe offer to allow herſelf to be viſited:

c) That ſhe make oath, that ſhe neither knows nor believes that ſhe is with child by her firſt huſband.

And in conſideration of this diſpenſation, obtained under the conditions mentioned, no penalty ſhall take place, excepting thoſe which regard the ſecond nuptials, which ſhall be treated of below, § 10.

If afterwards, nevertheleſs, it be found that ſhe was with child, all the penalties juſt mentioned ſhall be inflicted upon her, notwithſtanding of her diſpenſation.

7.) When a woman has been ſeparated on account of impotence, or when the huſband is dead after nine months abſence, or if the ſuit for obtaining a divorce have continued as long, ſhe may marry again immediately, with a diſpenſation, and no penalty ſhall take place, except thoſe which regard ſecond nuptials.

§ 8. When

§ 8.

When a widow ſhall publicly lead a ſcandalous life, or ſhall even bear a baſtard child, ſhe ſhall loſe all that ſhe had got by her huſband, which ſhall go to the children of the firſt marriage. Neither can ſhe diſpoſe of more than one third of her own fortune; and ſhe ſhall be bound to leave the reſt to her children: if ſhe have no children, ſhe may diſpoſe of all her fortune.

§ 9.

As to widowers, we have fixed the time of their mourning to ſix months. They may nevertheleſs demand a diſpenſation to marry before that term be elapſed; and we declare, that it ſhall not be refuſed after ſix weeks from the diſſolution of the marriage, eſpecially to peaſants, burghers, and others, who cannot all alone continue their trades or buſineſs: in this caſe there ſhall no other penalties be impoſed, but thoſe that are impoſed on ſecond marriages.

§ 10.

When a widower and a widow want to marry a ſecond time, after the time of mourning is elapſed, they cannot indeed be hindered ſo to do: but as experience does but too much prove, that in this caſe the love of fathers and mothers towards children of the firſt marriage is uſually cooled, and that a remarkable preference is ſhown to the ſecond wife or ſecond huſband, as well as to the children of the ſecond marriage, over thoſe of the firſt; it is our pleaſure, to prevent theſe bad effects, and to tie, ſo to ſpeak, the hands of thoſe who marry a ſecond time, by enacting and ordaining,

1. That one who marries a ſecond time, ſhall have only the uſufruct during life, of all that was got from the defunct ſpouſe, or inherited from the children of

the firſt marriage, but that the children of the firſt marriage alone ſhall have the property of it.

2.) Whatever has been left in legacy to one of the married perſons, on condition not to enter into a ſecond marriage, ſhall immediately be acquired by full right to the children of the firſt marriage.

3.) From ſuch a ſpouſe ſhall be taken the guardianſhip and care of the education of the children, after the judge ſhall have taken cogniſance of the affair, and deemed that ſtep convenient.

4.) Neither to the ſecond ſpouſe nor to the children of the ſecond marriage, ſhall be given nor left in legacy, more than the leaſt provided of the children of the firſt marriage ſhall inherit from their deceaſed parent.

If, then, more be diſpoſed of in their favour, the diſpoſition ſhall only be valid to the extent of the ſum, which renders them equal to the leaſt provided child of the firſt marriage, and the ſurplus ſhall be divided by equal portions between the children of the two marriages.

5.) When a widower or a widow ſhall marry a third time, all thoſe penalties ſhall ſo much the more take place; and what the children of the two firſt marriages ſhall gain thereby, ſhall be divided among them by equal portions.

6.) And as no perſon can marry a ſecond or third time, before having ſettled affairs with the children of the firſt and ſecond marriage, the guardians ſhall take care, when they ſhall aſſiſt at thoſe ſettlements, that the gains juſt mentioned, be well ſecured to their pupils. See below, § 24.

7.) For this purpoſe, we have alſo granted to the children of the firſt marriage, a tacit hypothec upon all the effects of their father and mother. But,

8.) All theſe penalties upon ſecond nuptials ſhall ceaſe,

a) If

a) If the children being of age, consent N. B. in writing to the marriage;

b) Or, if the defunct spouse by will, by writing, or before two unexceptionable witnesses, have allowed or advised the survivor to marry again.

§ 11.

V.) To render a marriage lawful, it is requisite, that it be contracted as an indissoluble bond, to subsist for the joint lives of the parties; so that one spouse cannot abandon the other, on pretext of a contagious distemper, disorder of mind, loss of goods or other things. Whence it follows, that a marriage which is only contracted for a time, is null and of no effect.

What is proper to be done, when one of the spouses is involved in some misfortune, as the consequence of a crime committed by such spouse, shall be shown afterward.

§ 12.

VI.) To render marriage lawful, it is requisite that both parties be fit for it; if either be not fit for it, the other shall have a year, reckoning from the celebration of the nuptials, to intent an action or complaint of nullity. Moreover, it is inconteſtable, that if the impotency happen only after marriage, it is a misfortune and an accident, for which it cannot be dissolved.

Neither can a marriage be dissolved on account of impotence, if it was known by the other spouse before marriage, seeing such spouse promised to live in an indissoluble union with the other, independent of carnal conversation.

Observe further, that neither is simple barrenness a sufficient cause to get a marriage dissolved.

When a married person denies the charge of impotence, an experienced physician and surgeon must make

make an inquiry into it; to whom muſt be joined a ſworn midwife, when the queſtion is concerning a woman.

Among the proofs of impotence, one of the ſtrongeſt, without doubt, is, when the wife who accuſes her huſband of impotence, offers herſelf to be inſpected, and makes it appear that ſhe is ſtill a virgin.

§ 13.

VII.) To render a marriage lawful, it is requiſite, that thoſe who intend to marry, be not relations within the forbidden degrees. Before giving an account of the forbidden degrees, it is neceſſary, previouſly to explain what is a *line*, and what a *degree*.

A *line* is nothing elſe but the order of ſome generations, whoſe commencement is reckoned from the ſtock, to deſcend afterward to the children, grandchildren, and ſo on.

A *degree* ſignifies a certain place of the line, ſerving to mark how far a generation is diſtant from the common ſtock.

A *line* is divided into *direct* and *collateral*.

§ 14.

In the *direct line* are comprehended thoſe who deſcend from one another, aſcendants and deſcendants infinitely. In the *collateral line* are thoſe who, though not deſcending from one another, have, nevertheleſs, their origin from the ſame ſtock; ſuch as brothers, ſiſters, uncles, aunts, &c.

The alliance of thoſe who being in ſome degree of conſanguinity with one of the ſpouſes, are thereby allied to the other, is called *affinity*. So *affinity* takes place only between one of the ſpouſes and the relations of the other; but the relations of the ſpouſes are not allied to each other.

§ 15. Mar-

§ 15.

Marriage is forbidden between the relations,

1.) Who are ſaid *to be one and the ſame fleſh*; ſuch are aſcendants and deſcendants to infinity.

2.) And thoſe who are ſaid to be *fleſh of one and the ſame fleſh*; ſuch are brothers and ſiſters. Wherefore, likewiſe, one cannot marry with the brothers and ſiſters by the father and by the mother, namely, uncles and granduncles, aunts and grandaunts.

§ 16.

An ally cannot, 1.) Marry one who has been married with a perſon who was of one and the ſame fleſh with ſuch ally. Wherefore one cannot marry with a father-in-law, a mother-in-law, a ſon-in-law, or a daughter-in-law.

§ 17.

As to the queſtion, 2.) Whether an ally may marry with one who was married to a perſon who was *fleſh of one's own fleſh*; (ſuch as the wife of one's brother, the huſband of one's ſiſter, the wife of one's uncle, and the huſband of one's aunt)? opinions are divided. Many reckon that theſe marriages are allowable, ſince it is even commanded to marry a brother's wife: ſo that thence may be concluded, that ſuch a marriage implies no moral turpitude. Others, nevertheleſs, maintain the contrary. This has induced us to ordain, that, in theſe caſes, no conſiſtory ſhall have power to grant diſpenſations, but that it muſt be reported and referred to our privy council of ſtate, in order to be there decided.

§ 18.

All other relations not comprehended among thoſe juſt mentioned, may marry together; ſuch are,

1.) The children of brothers and ſiſters; and, 2.) Still more

more thoſe who are relations in the third degree, and in an indirect line.

It is likewiſe allowable to all allied perſons, who are not in the caſes mentioned, to intermarry: thus, a father and a ſon may marry two ſiſters.

§ 19.

It may happen that a man may incline to marry the widow of his father-in-law, or of his ſon-in-law, or a woman the widower of her mother-in-law, or of her daughter-in-law. Though there be no real affinity betwixt theſe perſons, and though there be no relation aſcendant and deſcendant *, but in the name only; nevertheleſs our will is, that thoſe ſort of marriages be not completed without a diſpenſation; but excepting theſe four caſes, no regard ſhall be had to the relations of aſcendant and deſcendant; and, conſequently, we aboliſh, by theſe preſents, all difference between the kinds of affinity.

Our will is alſo, that the Jews conform to what has been juſt preſcribed.

§ 20.

The queſtion has often been canvaſſed, When a huſband commits inceſt with a relation of his wife, for example, if he had a criminal correſpondence with his mother-in-law, &c.; or if the wife commits inceſt with her huſband's relations, for example, with her father-in-law, &c. whether the marriage can ſubſiſt? Many are of opinion, that the marriage is null in law, by reaſon that inceſt would be perpetuated by ſuffering it to ſubſiſt. But we are not of this opinion; and we think, that if the innocent party does not incline to ſeparate from the guilty, the marriage ought to ſubſiſt, by reaſon that, not deſiring a ſeparation, ſuch

* Reſpectus parentelæ.

party,

party, together with the children by the guilty, would involved in the puniſhment.

§ 21.

Before marriage it is likewiſe requiſite, that proclamation of bans be thrice made, on three ſucceſſive Sundays; and this is to be done, even though it were a perſon N. B. who had before been got with child by another; and our will is, that no court of juſtice aſſume to itſelf the right of diſpenſing with the three proclamations, nor even with two of them; and in conſequence we ordain, that application be made to us immediately for theſe diſpenſations, for which twenty-four rix-dollars ſhall be paid, for the uſe of the royal library.

As to a diſpenſation for one proclamation, it may be granted by our conſiſtories, ſettled in the provinces; but even in this caſe, they ſhall be bound to remit to our royal library the duties for a diſpenſation.

Moreover, we allow the cuſtom to ſubſiſt in regard to the proclamation of the bans of the nobility, of having them proclaimed without their being named.

§ 22.

Proclamation of bans ſhall not be neceſſary,

1.) When the two perſons were publicly eſpouſed, and when it is found, that, having had carnal correſpondence together, the bride is thereby become pregnant.

2.) When one being at the point of death, or,

3.) Condemned to death, would have his marriage celebrated with the perſon to whom he was publicly eſpouſed, and there is not ſufficient time to apply to the conſiſtory, the marriage may be celebrated, and the nuptial benediction given, without proclamation of bans.

4.) Neither ſhall any one be obliged to cauſe proclamation of bans be made in time of peſtilence.

§ 23.

A ſoldier's bans cannot be proclaimed unleſs he ſhall produce a permiſſion to marry from his commanding officer; and if he do produce it, the bans muſt not only be proclaimed in the bride's pariſh-church, but likewiſe by the miniſter of the garriſon or regiment.

§ 24.

Bans ſhall not be proclaimed for any widower or widow, till they have ſettled affairs with the children of the firſt marriage, and produced a certificate from the judge to that effect.

But as it often happens, that the children, or their guardians, with a view to raiſe obſtacles to the marriage of their father and mother, hinder their affairs from being ſettled, our will is, that what follows be obſerved.

Fathers or mothers who incline to marry a ſecond time,

a) If they have children who are ſtill in nonage, or minors, ſhall cauſe a guardian or curator to be named for them, who ſhall be choſen from among their relations, if there be any; and if there be none, they ſhall propoſe ſome other honeſt man for this purpoſe, that affairs may be ſettled with the guardian or curator named.

b) They ſhall communicate to him an inventory of the effects of the defunct ſpouſe, ſuch as they drew it up when they took upon themſelves the charge of adminiſtration or tuition of theſe effects, and ſuch as they have depoſed it to be before a judge, with the accounts of their adminiſtration or guardianſhip.

c) The children, or their guardians, ſhall be bound

to

give their conſent or objections to the accounts, hin the term of ſix weeks; which they ſhall deliver o the judge, requiring him to communicate them to their relations, and to fix a time for regulating and ſettling their matters.

d) The judge, by his office, ſhall on the appointed day name a commiſſioner,

e) Who ſhall chiefly take care that the profits which ariſe to them on account of the ſecond marriage, be brought to account, and added to the inventory, as well as what the children have acquired after making up of the inventory. See above, § 10. n. 6.

f) The days appointed for regulating the childrens affairs, cannot by them be diſappointed on any pretext whatever.

g) When the affairs of the children ſhall thus be ſettled, the judge ſhall be at liberty, in caſe there ſtill be any thing unſettled, eſpecially if they be affairs of moment, to ordain that the fathers and mothers ſhall ſtill regulate theſe affairs before their marriage, or ſhall give ſurety, or depoſit with the judge, the ſum with reſpect to which they are ſtill at law with their children; and the fathers or mothers ſhall be bound to advance them the neceſſary charges for the proſecution of this ſuit.

Whatever the judge ordains thereupon, ſhall be executed, notwithſtanding any proteſtation of either party, and when the fathers or mothers ſhall have fulfilled the ſentence, the certificate requiſite for their marrying again ſhall be delivered to them gratis.

h) When one of the married perſons does not incline to enter heir to the other, ſuch perſon ſhall be bound, after furniſhing a particular account of the fortune to the other ſpouſe, to deliver it up without retaining any part of it.

i) If one ſhould marry again, without having ſettled with the children of the firſt marriage, ſuch per-

ſon ſhall not only loſe all the advantage which would have ariſen from the firſt marriage, but the children ſhall be at liberty, when they ſhall attain the age of puberty, to produce a particular account of their claims, and to take the oath called *juramentum in litem*, that they believe their effects amount to ſo much, and are perſuaded that the particular account contains neither more nor leſs than what is their due; and the amount ſhall be paid them without any modification or diminution of their claims. The fathers or mothers, in puniſhment of their contravention of what has been preſcribed to them, ſhall not be heard in contradiction to this; but they ſhall be obliged to reſtore the fortune, in terms of the oath of their children. Neither is it our will, that, in this caſe, theſe fathers or mothers be admitted to the guardianſhip of their children; but we ordain, that the judge name them other guardians.

k) No miniſter can celebrate the marriage of a father or of a mother, having children of a firſt marriage, till a certificate be produced to him, proving, that affairs have been ſettled with the children of the firſt marriage; which certificate ſhall be inſerted in the church-regiſter; without which, he ſhall be anſwerable to the children for all damages, and ſhall, beſides, be fined in fifty rix-dollars.

If theſe fathers or mothers get their marriage celebrated out of the country, they ſhall be condemned in a conſiderable fine, or elſe to a corporal puniſhment.

l) If, by ſub and obreption, they ſhould obtain a diſpenſation from us on that account, the children ſhall not, for that reaſon, loſe any thing of their right; but they ſhall, notwithſtanding, be always intitled to oblige their parent to ſettle with them. They may ſupply the defects of the inventory, and aſcertain them

them by the oath called *juramentum in litem*, as has been ordained above.

m) The ſettlements with the children of the firſt marriage ſhall take place, even though there were nothing to divide with them. For it is only by the judge's certificate that it can be proved that there is nothing to be divided.

n) The judges, who, without having previouſly made a ſtrict examination into the affairs, ſhall grant a judicial certificate, ſhall be bound for the whole to the children of the firſt marriage, for all the damage which happens to them by it, and which the children can aſcertain upon the above-mentioned oath.

§ 25.

Neither can miniſters proclaim the bans of perſons unknown, or who are not of their own pariſh; but our will is, that they obſerve what follows.

1.) When ſtrangers want to have their bans proclaimed in the countries under our government, they ſhall be bound to publiſh them at the ſame time in the place where the parties, or one of the two, ſhall till that time have made their reſidence, and to produce a certificate from the magiſtrate of the place, proving, that they have obſerved this formality; and whenſoever that condition ſhall not be fulfilled, neither the miniſter nor magiſtrate can grant a certificate of the proclamation of bans; far leſs can the miniſter celebrate the marriage.

2.) If the perſons who preſent themſelves to be married be vagabonds, who, having no fixed reſidence, are not in a condition to produce the certificate required; our will is, that their marriage be not celebrated in our dominions.

3.) If the bridegroom be a German, and the bride a French woman, the proclamation of bans and the celebration of the marriage may indeed be performed by

by the German miniſter; but the bans muſt alſo be proclaimed in the French church, and the parties muſt be adviſed of it, before proclamation of the bans in the German church. In the ſame manner when the bridegroom ſhall be French, and the bride German, the proclamation of bans, and celebration of the marriage ſhall indeed be performed by the French paſtor; but the bans muſt likewiſe be publiſhed in the German church.

4.) If one had two or ſeveral reſidences, the proclamation muſt be made in all the places where he uſually reſides.

5.) If a third perſon apply to the paſtor at the time of proclamation of bans, to object againſt them, they ſhall not indeed be ſtopped thereby, but the paſtor ſhall be obliged to ſuſpend the celebration of the marriage, and to refer the parties to the judge-ordinary.

As an objection is very often made, only with a view to vex the parties, and for this purpoſe is ſometimes delayed till the moment of the third proclamation, when every thing is already prepared for the nuptials; our will is, indeed, that the celebration of the marriage be ſuſpended; but the proceſs ſhall be very ſummary, and the court, on the requeſt of one or other of the parties, ſhall grant but a ſhort day of appearance, and ſhall hear them verbally. If he who made the objection do not appear in perſon, or do not immediately prove his claim, which he may do even by giving oath, the objections ſhall forthwith be rejected.

But if he give oath, that he had no ſooner knowledge of the proclamation of bans, and gives juratory ſecurity for reimburſement of the charges expended for preparations for the nuptials, the farther proceedings in the affair ſhall be made, in the courſe of ordinary actions.

If it be found that the objection is made wrongfully and without cauſe, the objector ſhall not only be

be puniſhed arbitrarily, but he ſhall, moreover, be condemned in coſts of ſuit, and to reſtore all the expenſes laid out for the wedding-feaſt, even though every thing were ſtill entire, or had been conſumed in the family. And that there may be no diſpute concerning the price of the proviſions, the perſon to whom the objection was made, ſhall be at liberty to give in a particular account of them, and after that has been examined, and proper deductions made, to verify it by the oath called *juramentum in litem.*

6.) It happens alſo, that betrothed perſons who are afraid of ſome objections, obtain a diſpenſation to get their bans proclaimed once for all: in this caſe the perſon who ſhall have betrothed another, ſhall nevertheleſs be bound, after the celebration of their marriage, to give the complainer an indemnification proportioned to the condition of the party. See on this ſubject the foregoing title, § 31.

The guilty perſon ſhall be obliged to ſubmit to the ſentence of the judge, with regard to the indemnification, as a puniſhment for ſuch perſon's want of honeſty; but if the innocent party do not think the indemnification ſufficient, complaint may be made againſt the ſentence.

7.) When betrothed perſons ſhall get their marriage celebrated without proclamation of bans, the marriage ſhall not thereby be annulled, but they ſhall only be obliged to get the nuptial benediction reiterated: nevertheleſs, as they have acted againſt the eſtabliſhed rule, they may be fined in proportion to their fortune.

§ 26.

IX. In fine, to render a marriage lawful, it is requiſite that it be celebrated and bleſſed by a miniſter; for it is by the nuptial benediction that the marriage receives its conſiſtency; and it is after the celebration and benediction that the rights and privileges annexed

nexed to it are begun to be enjoyed. Whence it follows, that if the husband die after the nuptial benediction, before having consummated the marriage, his spouse shall, nevertheless, enjoy the rights of a married woman; she shall bear the name of her husband, and shall be admitted to the enjoyment of what is granted her by the donation on account of the nuptials, the dowery, the portion called *statutaria*, &c.; only to the present made the day after the nuptials, called *morgengabe*, she has no right.

When the betrothed persons have carnal correspondence, the marriage is thereby concluded, and the children who are born of this correspondence are regarded as lawful. But if the husband happen to die before the celebration of the marriage, all the nuptial advantages shall be lost to the woman. She shall only recover her portion, and can claim neither the donation granted on account of the nuptials, nor the dowery, nor the portion called *statutaria*, nor *morgengabe*, nor *gerade*, &c. Neither can the husband, if the wife die before the nuptial benediction, obtain the portion, (in case it were to fall to him by virtue of an agreement, or by custom), nor the portion called *statutaria:* neither is the community of goods contracted between the betrothed persons by carnal correspondence alone; for it is only after the benediction that all these nuptial advantages begin to be enjoyed.

§ 27.

Marriage shall be celebrated in the church, unless a dispensation be obtained from the consistory, or that it be a marriage of servants, whose masters give the wedding-feast, or that one of the espoused persons fall suddenly ill, or being condemned to death, would have their marriage celebrated before their departure.

In these cases it shall not be necessary to ask a dispensation for marrying in a private room.

Persons

Perſons of diſtinction may be married in a private apartment, which ſhall likewiſe be allowed to perſons who ſhall have been got with child before the marriage.

It ſhall not be allowable, without permiſſion from the conſiſtory, to get marriages celebrated in Advent, nor in Lent, for the fifteen days preceding Chriſtmas and Eaſter, nor on the Lord's day.

The nuptial ceremony is performed, and the benediction ſometimes given to the audience, when one who is condemned to eſpouſe a perſon, refuſes to obey and takes flight. In this laſt caſe, an officer of the revenue ſhall ſay the words, *I will*, or pronounce the conſent by word of mouth in the name of the perſon condemned. See the preceding title, § 36. n. 4.

§ 28.

The nuptial ceremony and benediction ſhall be performed by none but the ordinary paſtor of the pariſh. If, however, for weighty reaſons, the conſiſtories intruſt another to perform it, the paſtor and other inferior officers of the pariſh ſhall nevertheleſs receive their fees, called *jura ſtolæ*.

§ 29.

No prieſt of the Roman-Catholic religion, can, without our permiſſion, celebrate the marriage of any of our ſubjects, of whatever religion they be: and we declare, that marriages celebrated by them, without permiſſion, ſhall be null, even though carnal correſpondence ſhould follow on them; that the children who ſhall be born of them, ſhall be held as unlawful; that the prieſt ſhall immediately be impriſoned and puniſhed, and the ſubjects ſeverely reprimanded.

§ 30.

Moreover, our will is, that thoſe who get their

marriage celebrated, be preſent in perſon, and that no private perſon can be married by proxy.

§ 31.

From a lawful marriage reſult certain rights and privileges.

1.) Between the ſpouſes or married perſons.

2.) Between the aſcendants and deſcendants.

3.) And between the collateral relations.

Of theſe we have ſpoken above in book I. title IX.

§ 32.

By lawful marriage, the married perſons acquire ſeveral actions; namely,

1.) The prejudicial or preparatory action, when one of theſe married perſons denies the other for a ſpouſe.

2.) The action of exhibition *, when any one keeps the ſpouſe concealed, were it even the ſpouſe's own father.

3.) The action called *in factum*, which takes place on occaſion of another's deed; and by which a huſband, for example, has a right to demand, that he who has ſeduced his wife, and engaged her in a criminal correſpondence, ſhould indemnify him fully for all damages and intereſt †.

ART. I.

How marriage is diſſolved.

§ 33.

A Marriage may be null from the beginning. It may likewiſe happen, that a lawful marriage ſhould be diſſolved for important reaſons.

* Ad exhibendium. † Ad omne id quod intereſt.

§ 34. A

§ 34.

A marriage is null from the beginning,

I. When conſent of both parties is wanting; which takes place alſo,

a) When one of the parties has not the free uſe of reaſon;

b) Or has been forced to marry, either by blows or by ſtrong threatenings: it is requiſite, nevertheleſs, that, in this laſt caſe, the perſon who is conſtrained apply to the judge within eight days after the celebration of the marriage, to complain of the violence done to ſuch party. For, after elapſing of that time, no complaint ſhall be heard.

II. When the conſent of parents, or of guardians and curators is wanting. *See the preceding title*, § 25. *and following*, & § 27. *above*.

III. When a man marries a ſecond wife during the lifetime of the firſt. *See the preceding title*, § 29. & § 6. *above*.

IV. When one marries a woman only for a certain time. *See above*, § 11.

V. When a marriage is within the degrees forbidden. *See above*, § 13.

VI. When one of the parties is not fit for marriage. *See above*, § 12.

VII. When one thought to marry a virgin, and afterward can prove the contrary.

Which ſhall be obſerved even though the girl had been violated, unleſs he who married her knew that circumſtance, or after knowing it, had nevertheleſs performed conjugal duty to her.

If a widow called herſelf a virgin, and as ſuch cauſed her bans to be proclaimed, and her marriage to be celebrated, it ſhall in like manner be invalid.

VIII. When an adulterer marries, without our diſpenſation, to the perſon with whom the adultery was committed, and to whom promiſes of marriage were

made in the lifetime of the firſt ſpouſe. Our will is likewiſe, that adulterers who have been prohibited by a ſentence to marry again, or at leaſt to marry again before a certain time, ſhould not marry without a diſpenſation, contrary to the tenor of the judgment paſſed.

IX. When one marries a woman whom he has forcibly carried away, even though it was with her own conſent.

X. When a guardian marries his pupil, without giving up his accounts before, ſhe may, when ſhe pleaſes, intent an action of nullity; and in this caſe the guardian ſhall be bound, not only to reſtore to her the fortune which he has by her with the intereſts, but even the half of his own fortune; unleſs the father, by his will, had expreſsly recommended this marriage.

XI. When a man in a ſervile condition * marries a free perſon, the marriage may be declared invalid, if the free perſon were ignorant of the ſervile condition of the other, or, after knowing it, did no longer perform the conjugal duty to him.

XII. When a commoner calls himſelf a gentleman, and, under this falſe pretence, marries a woman of quality, the marriage may be declared null, as in the preceding caſe.

XIII. When a marriage is declared null, all the nuptial advantages and rights ceaſe; the huſband is obliged to reſtore the portion, and the wife loſes what is given her by the donation on account of the nuptials: both are deprived of the portion called *ſtatutaria*, and the children are reckoned illegitimate, and do not ſucceed to any member of the family.

From this muſt be excepted the caſes in which one of the parties being overtaken and deceived, ſhall proſecute the other for having the marriage annulled.

* Glebæ adſtrictus, homo proprius.

Of

Of this number are the caſes mentioned in N° 1. 6. 7. 11. & 12. Our will is, that in ſuch caſes, the children be reckoned lawful, and that whoever made uſe of fraud be bound to make good to the innocent party the nuptial advantages and rights, in the ſame way as if that party were in the ſtate of widowhood; and to pay, as long as the children live, the half of their maintenance.

§ 35.

A lawful marriage, though completed, may be diſſolved for ſeveral cauſes; namely,

I. By the death of one of the ſpouſes, which is alſo to be underſtood of their civil death, when one or other of them is proſcribed.

II. When married people ſhall demand, with common conſent, the diſſolution of their marriage, our will is, that the procedure in the affair be only gradual. Firſt, Endeavours ſhall be uſed to reconcile the parties, and all the motives that ought to determine them to this, ſhall be propoſed; obſerving, if it be neceſſary, to call a clergyman, to give them a ſuitable exhortation. If theſe ſteps prove ineffectual, they ſhall be ſeparated from bed and board for one year.

If, at the year's end, there remain no more hopes of reconciling the parties, and they perſiſt in their petition, the marriage may be diſſolved.

III. The marriage may be diſſolved at the requeſt of one of the parties, having lawful cauſes to petition for its diſſolution; ſuch are the reaſons following:

IV. When one of the married perſons ſhall have committed adultery, and been convicted of it; which ſhall be obſerved, even though we had granted ſuch perſon letters of pardon.

From this rule muſt be excepted the caſes following.

a) If the ſpouſe complaining, had alſo committed adultery; and in this caſe, we reſerve to the fiſcal the

the right of profecuting both, for the public benefit. b) When the offended party has pardoned the other's fault; which ſhall be preſumed, if ſuch party had performed the conjugal duty to the other. c) If one of the ſpouſes had occaſioned the other to commit adultery, as if ſuch party had refuſed the conjugal duty, or if, for example, the huſband himſelf had acted as a pimp to his own wife, &c. d) If the woman commit adultery, really believing that ſhe has to do with her own huſband. e) If the wife marry again, after having received credible accounts of her huſband's death, and after having produced them before a judge, and the firſt huſband appear again.

V. If a wife, againſt the inclination and prohibition of her huſband, have a ſuſpicious correſpondence with a man, as if ſhe wrote him love-letters, &c.; for, although the crime of adultery cannot thereby be proved, yet theſe tokens and preſumptions are ſufficient to diſſolve the marriage.

VI. Marriage is likewiſe diſſolved, when one of the married perſons maliciouſly forſakes the other.

But any one, who, on the foundation of malicious deſertion, petitions for a diſſolution of marriage, muſt prove that the other party's intention was really to abandon the complainer.

When this proof is brought, the action for malicious deſertion may be immediately raiſed, and the ſpouſe cited by an edict.

If it be doubtful whether the abſent ſpouſe intended to forſake the complainer, it ſhall be requiſite, previous to any procedure on the diſſolution of the marriage, a) That the fugitive ſpouſe be abſent without cauſe for two years: b) That ſuch fugitive be formally ſummoned, ſo that if the defender's reſidence be unknown, and the plaintiff ſwear that it is ſo, the defender be cited by an edict: c) But if the defender have declared a willingneſs to come to a certain place,

the

the citation by edict ſhall there be affixed: d) That afterward an attorney be named to manage the defence upon the accuſation * of malicious deſertion: e) After which, ſentence ſhall be given upon the accuſation, as circumſtances ſhall require.

If the ſpouſe cited appear before publication of the ſentence, and produce good reaſons of abſence, the complainer ſhall be bound to return, and perform the conjugal duty, if there be no other reaſon for aſking the divorce: provided always that the coſts of ſuit be reimburſed to the complainer.

If the ſpouſe cited appear after publication of the ſentence, and if good reaſons of abſence be given, and the complainer be not yet married again, what is ordained in the preceding caſe ſhall be obſerved: but if the complainer be betrothed or married to another, the ſecond marriage ſhall ſubſiſt. The firſt ſpouſe, however, may claim the children of the firſt marriage.

If one of the ſpouſes marry again without obſerving the preſcribed formalities, both the new ſpouſes ſhall be puniſhed as bigamiſts.

When a marriage ſhall be annulled on account of wilful deſertion, the guilty party cannot marry again without a diſpenſation from us.

If ſuch party marry without obtaining a diſpenſation, the marriage ſhall be null.

Moreover, it is abundantly evident, that the innocent party ſhall be put in poſſeſſion of the wilful deſerter's effects, and ſhall enjoy them for life, even though ſuch party ſhould marry a ſecond time.

The abſence of one who went away for a laudable reaſon, cannot be regarded as a wilful deſertion; for example, if one were abſent ſeveral years on an embaſſy, or in the army, or overſeeing one's commercial

* Ad hunc actum,

affairs,

affairs, one could nowiſe be eſteemed a malicious or wilful deſerter; unleſs other circumſtances occaſioned a different judgment to be paſſed on the abſence. See the preceding title, § 39. n. 11.

VII. Marriage may likewiſe be diſſolved when one of the ſpouſes conceives an irreconcileable enmity againſt the other, and when one of the parties gives occaſion for the enmity by abuſing the other in a violent manner, by contracting the venereal diſeaſe, by attempting the life of the other, by committing crimes for which ſuch ſpouſes may be condemned to the wheel-barrow, to whipping, to death, to baniſhment, or to be branded with infamy, &c.

VIII. If one of the ſpouſes becoming furious or fatuous, ſhould continue in that ſtate for ſeveral years, and for that reaſon the other petitioned for a diſſolution of the marriage; eſpecially if it were a woman, who on account of her commerce, or the ſtate of her affairs, might have an indiſpenſable need of a huſband's aſſiſtance: but in this caſe, the judge ſhall take care that proviſion be made, above all things, for the maintenance of the fatuous perſon, &c.

§ 36.

A marriage once completed, cannot be diſſolved on pretence of an error in the name, religion, condition, or fortune of either party. Wherefore a huſband cannot put away a wife who has not, or cannot produce the portion promiſed.

§ 37.

When two perſons ſhall have lived a long time together as huſband and wife, and afterward one of them ſhall pretend that matrimony was not celebrated between them; our will is, that, notwithſtanding of this, the marriage ſubſiſt in puniſhment of their correſpondence, and that it be celebrated, and have the benediction;

benediction; and we ordain, beſide, that there be ſome puniſhment inflicted on them.

§ 38.

When the huſband ſhall give occaſion for the diſſolution of the marriage, not only, a) He ſhall reſtore the portion, but, b) He ſhall alſo loſe the property of what was given him by the donation on account of the nuptials. And, c) If there be neither portion nor donation on account of the nuptials, the wife ſhall gain the third of all the huſband's effects, upon the footing that they ſtood when the diſſolution of the marriage was ordained by a ſentence.

If a dowery were agreed upon, the wife may claim the portion, and afterward chuſe either the dowery or what was granted by the donation on account of the nuptials; but ſhe cannot claim the benefit of both.

If the ſucceſſion be regulated by law between the married perſons, and reſtricted to a certain portion, which is called *ſtatutaria*, or if a certain portion be determined by will, it will depend upon the woman, as the innocent party, either to make choice of that portion, or to keep by her own portion, and the donation on account of the nuptials.

When the marriage ſhall be diſſolved by the wife's fault,

1.) The huſband ſhall gain the portion, or that part called *ſtatutaria*, in places where it is cuſtomary.

2.) He ſhall not be bound to execute the donation on account of the nuptials.

3.) If there be neither portion nor donation on account of the nuptials, he ſhall gain the third part of all the wife's effects, ſuch as they ſtood when the marriage was diſſolved by ſentence.

§ 39.

In both caſes, the innocent party ſhall only obtain the ſimple enjoyment of the effects aſſigned to ſuch

party. For our will is, that, in the firſt caſe, the property of what was granted by the donation on account of the nuptials, and in the ſecond, the property of the portion, or the third part of the fortune, ſhall remain for the children born of the marriage.

§ 40.

As to what is to be obſerved, when it is a ſtranger, or the father, who gives the portion, or makes the donation on account of the nuptials; we ſhall treat of it below, title IV. art. I. § 71. *and following.*

§ 41.

Even though the innocent party had by will bequeathed any thing to the ſpouſe who occaſioned the diſſolution of the marriage, the legacy ſhall be null, and ſhall be reckoned revoked by the diſſolution.

§ 42.

The ſpouſe who has a right to exact the advantages juſt mentioned, may do it,

1.) By an action on the agreement *.

2.) By a perſonal action, or an action to recover what we demand in law †.

3.) By an action of mortgage ‡.

ART. II.

Of ſeparation from bed and board.

(De ſeparatione quoad torum et menſam.)

§ 43.

IT often happens, that differences ariſe between huſband and wife, and that, for example, the wife

* Actionem ex pacto. † Per condictionem ex lege.
‡ Per actionem hypothecariam.

complains

complains of the huſband's bad treatment of her, and the huſband of the wife's vices, her ſquandering, inclination to drinking, &c.; and this occaſions that they neither will nor can live longer together.

In ſuch caſes it is not lawful for them to ſeparate by their own authority, and without the intervention of a judge. If they do ſo, they ſhall be obliged to be reconciled, or elſe to allege before the judge-ordinary, their cauſes of ſeparation, and the huſband ſhall be bound to advance the charges of ſuit.

§ 44.

When one of the ſpouſes ſhall have valid reaſons to complain of the other, methods of accommodation ſhall firſt be tried, calling in, if neceſſary, the aſſiſtance of their paſtors.

If a reconciliation cannot be accompliſhed, the diſſolution of the marriage ſhall not immediately be ordered, but they ſhall be ſeparated from bed and board, for a year's time at moſt.

§ 45.

This ſeparation ſhall be ordered, even though the perſon guilty of the abuſe complained of, ſhould promiſe, under ſecurity, not to miſbehave any more to the complainer.

§ 46.

If the huſband occaſioned the ſeparation, the wife ſhall be at liberty to redemand what ſhe brought to her huſband, namely her portion, and her paraphernalia, or elſe to require her huſband to maintain her according to her condition; this maintenance, moreover, ſhall not be determined in proportion to her portion, but according to the condition and fortune of her huſband. Our will is alſo, that this maintenance be granted to wives, even though they brought no portion to their huſbands.

§ 47.

If it be the wife who occaſions the ſeparation, the huſband ſhall be at liberty to reſtore what ſhe brought in marriage, or elſe to give her a neceſſary aliment. Beſides, he ſhall be bound to maintain her, even though ſhe had brought him no portion; provided always, that ſhe have not means of ſubſiſtence; for we refer to the prudence of the judges, to regulate this maintenance, according as the wife ſhall be in a condition of gaining her bread, by going into ſervice, or otherwiſe.

§ 48.

The children ſhall be left in the hands of the innocent party, and the guilty party cannot be diſpenſed from furniſhing their expenſe, according as the judge ſhall find it equitable. The judge, however, may take other methods, if he deem it advantageous for the children themſelves.

§ 49.

As in theſe caſes there is a difficulty in agreeing with reſpect to the lodging; our will is, that what follows be obſerved.

If the houſe belong in property to the wife, the huſband, be he guilty or not, ſhall be bound to clear it at the wife's requiſition, and to leave her the enjoyment of the advantages annexed to it; but the wife alſo ſhall be obliged to procure to the huſband a proper lodging, if ſhe gave occaſion to the ſeparation.

If the huſband be proprietor of the houſe, the wife ſhall in like manner clear it, be the huſband to blame or not; but, indeed, he cannot be diſpenſed from paying for her, according to the judge's determination, a ſuitable rent.

If they be in a rented houſe, and if it be not thought convenient to leave them in the ſame houſe, that

that one of the ſpouſes who gave occaſion for the ſeparation, ſhall be obliged to go out of it.

§ 50.

If the huſband do not agree, as to the effects brought by the wife, ſhe ſhall be obliged to prove them, and within a ſhort ſpace the judge ſhall determine the ſum to which they ought to amount: In all events, if the huſband occaſioned the ſeparation, the wife's aſſertion concerning what ſhe brought ſhall be admitted, provided ſhe give the oath called *juramentum in litem*; moreover, an appeal from the judgment which ſhall be paſſed on theſe affairs, ſhall have no effect to ſuſpend its execution.

§ 51.

When both ſpouſes are to blame, the choice mentioned in the preceding article ſhall not take place, but the judge, by his own authority, ſhall determine the ſum for the alimony, and regulate the methods to be taken with reſpect to the lodging and the children. Our will is alſo, that the appeal from ſuch a judgment ſhall have no other effect, than that of rendering the ſuit cogniſable by a ſuperior court*, without ſuſpending the execution of the ſentence.

§ 52.

During the ſeparation, both parties ſhall abſtain from all violent methods, threatenings, and injurious words.

If any ſuch thing be dreaded from either of the ſpouſes, the judge may oblige that one that appears froward to give ſecurity, not to abuſe the other ſpouſe; and this ſecurity may be given, either by ſureties or by pledges depoſited. If the party cannot bring ſuch ſecurity, ſuch party ſhall be ob-

* Quoad effectum devolutivum.

liged

liged to give oath; and if that be violated, ſhall immediately be put in priſon, and puniſhed as a perjured perſon.

§ 53.

The time of ſeparation being elapſed, the two married perſons ſhall be obliged to come together again. If the wife who has been ſeparated on account of her huſband's ill uſage, be afraid that he will continue to abuſe her, and the huſband be of a diſpoſition to make it be apprehended that this may happen, the judge ſhall have power to oblige him to give the ſecurity mentioned in the preceding article.

§ 54.

If either of the married perſons abſolutely will not rejoin the other, means of accommodation ſhall be tried, calling the aſſiſtance of a clergyman; and if theſe be not ſucceſsful, and an irreconcileable enmity appear between the ſpouſes, the marriage may be diſſolved; making this difference between the parties, that the one who ſhall be found to be the occaſion of the divorce, ſhall likewiſe bear all the penalties. That one, however, ſhall be exempted with reaſon from the penalty of the divorce, who ſhall give evidence of an inclination to join the other, and having even offered ſecurity, the other, nevertheleſs, perſiſted in refuſing to be reconciled.

§ 55.

If one of the ſpouſes die during the ſeparation, the other may claim the advantages gained by virtue of the marriage-articles, or of the ſtatutes concerning the ſhare called *ſtatutaria*, becauſe the marriage really ſtill ſubſiſts.

ART.

ART. III.

Of the marriage called left-hand marriage.

(De matrimonio ad morganaticam.)

And of concubines.

(De concubinis.)

§ 56.

After having ſhown that the paternal power is acquired by lawful marriage, and explained in what ſuch a marriage conſiſts, it remains to examine the effects which left-hand marriages, and concubinage, have in the ſtates under our government.

§ 57.

A diſtinction muſt then be made between a concubine who is joined to a man by the bond of the nuptial benediction after bans have been proclaimed, with a view of cohabiting together during life, and to procreate children, (but with an expreſs declaration, that neither the wife nor children ſhall be received into the family, nor partake of the rights belonging to it), and a concubine whom a man takes ſolely to ſatisfy his pleaſure, and without the intervention of the nuptial benediction.

§ 58.

The firſt ſort of concubinage, which is called left-hand marriage *, ſhall not be allowed by the laws.

Nevertheleſs, as it often happens, that a man of quality, or in an eminent ſtation, will not, for the good and preſervation of his family, engage in a ſe-

* Matrimonium ad morganaticam.

cond

cond marriage, though he have not the gift of continence, our pleaſure is, in ſuch caſe, to grant him the liberty of taking a left-hand wife.

§ 59.

1.) But our will is, that for this purpoſe he apply immediately to us, and lay before us the reaſons which have induced him to take this reſolution.

2.) That he declare what he deſigns to leave to his wife after his death, for her maintenance, and that of the children whom he ſhall have by her. For this purpoſe,

3.) He ſhall give a particular account of his effects, which he ſhall aſcertain to be as exact as if he were to ſwear to it.

4.) Thereupon we will cauſe the affair to be examined, and will declare our farther intentions.

5.) After having obtained our conſent, both parties ſhall be bound to get their bans proclaimed, for three ſucceſſive Sundays, to prevent the objections that might be made to the marriage.

6.) After which, the marriage may be celebrated, and the nuptial benediction performed in a private room.

§ 60.

Thoſe who ſhall in this manner conclude a left-hand marriage, ſhall acquire ſome advantages annexed to lawful marriage. Thus, a left-hand marriage ſhall be indiſſoluble; the huſband cannot marry two concubines; the wife will commit a real adultery, if ſhe have an illicit correſpondence with any other than her huſband; and the marriage cannot be diſſolved but for the reaſons mentioned above, on the ſubject of lawful marriage.

But as this concubine does not enter into the huſband's family, ſhe ſhall not obtain the rights annexed to it, nor the rank and dignity of a lawful wife. Thus ſhe

ſhe ſhall bear neither the name nor the arms of her huſband; ſhe ſhall not obtain the right of becoming ſubject to the ſame juriſdiction as he; but ſhall remain under that to which ſhe was before ſubject. For the ſame reaſon, ſhe cannot have a portion aſſigned to her; nor her huſband give her a donation on account of the marriage, nor a dowery; far leſs can ſhe claim the portion called *ſtatutaria*; but ſhe ſhall be obliged to be ſatisfied with what is ſettled by our conſent in the contract of marriage; and if the huſband had left her a legacy, or given her more than this contract bears, ſhe ſhall be obliged, after her huſband's death, to reſtore the ſurplus to the lawful children, or to the relations of the defunct.

§ 61.

And as the children of ſuch a marriage will thereby be born out of the family, it naturally follows, that they will indeed be lawful, and comprehended in the number of thoſe whom the laws regard as ſuch; that they will be under the paternal power; and that they cannot marry without their father's conſent, under pain of being deprived of the portion allotted to them; and that, moreover, they ſhall enjoy all the rights of kindred or of cognation, &c. But as to the rights of family and agnation, they can by no means aſſume them. Thus they ſhall carry neither the name nor arms of their father; they ſhall not have the advantage of being ſubject to the ſame juriſdiction as he, but ſhall be ſubject to that under which their mother lives, and ſhall ſucceed neither to the fiefs, nor feoffments in truſt of the family.

Neither ſhall they ſucceed to their father inteſtate, nor conſequently to his relations; but they ſhall be obliged to be ſatisfied with the portion ſettled in their favour in the contract of marriage, which cannot even be augmented neither by donation nor by will.

If the father, in his lifetime, declared that he regards his wife as a truly lawful wife, if he allowed her to bear his name and arms, and if in his lifetime he obtained our royal conſent and confirmation for ſo doing, the children ſhall enjoy the ſame rights as the children legitimated by the ſubſequent marriage of their mother.

§ 62.

Concubinages of the ſecond order ſhall remain prohibited for the future, as they have been for the time paſt; becauſe, on one ſide, that kind of impure and infamous correſpondence may occaſion great diſorder in families; and, on the other, they occaſion thoſe creatures, or concubines, to procure abortion, or to expoſe their children, and even to murder them.

§ 63.

If, nevertheleſs, any one ſhould have correſpondence with a concubine, and have children by her, neither the concubine nor children can be reckoned lawful. Thus the children ſhall not be reckoned to have one certain father; they ſhall not be under the paternal power; but they ſhall follow their mother's fortune. They ſhall bear her name and arms. If, in ſuch a caſe, a man do not own, that he had carnal knowledge of the concubine who ſays ſhe is pregnant by him, and deny that he is father of the child, ſhe ſhall be bound to prove the carnal correſpondence, and may, if ſhe pleaſes, put it to his oath.

If he cannot deny the carnal correſpondence, but pretends that the time in which he had that correſpondence with her, does not anſwer to the time of the child's birth, it ſhall be the woman's buſineſs to prove the time of the correſpondence.

But if he ſhould maintain, that ſhe had likewiſe a criminal correſpondence with others, he ſhall be obliged

liged to prove it, which he may alſo do by a reference to her oath.

§ 64.

If one who has had a criminal correſpondence with a woman, own it, and acknowledge the child for his own, he ſhall be bound,

I. To marry her whom he has got with child, or to give her a portion. He ſhall alſo be obliged to ſettle a portion on her, even though ſhe ſhould have a conſiderable fortune, or ſhould marry another.

If he offer to marry her, and ſhe will not give conſent, the obligation to give her a portion ceaſes by her refuſal; but when the refuſal comes from the relations, and not from the perſon who was got with child, ſhe and her relations ſhall be intitled to demand the portion.

§ 65.

In caſe the perſon whom a man has got with child, have already committed a like fault, or were otherwiſe a perſon of bad fame, and it can immediately be proved, or if ſhe have ſeduced him who has got her with child, or have conſented to his deſires for money or value, or have even received any ſuch thing before the carnal correſpondence, ſhe cannot claim a portion, but ſhe ſhall be obliged to be ſatisfied with four rix-dollars for the midwife, and the baptiſm.

§ 66.

II. One who has got a woman with child, ſhall be bound to maintain the child, though illegitimate; which he ſhall be obliged to do,

1.) Even though he may have been ſeduced, or enticed to the carnal correſpondence:

2.) Though the child be born in adultery or inceſt:

3.) Though the woman had formerly committed a like fault with another: and,

4.) Though ſhe ſhould refuſe to marry the father of the child.

5.) If a man, indeed, confeſſes the carnal correſpondence, but at the ſame time pretends that the woman has had to do with others, he ſhall be bound to maintain the child, till he has proved that another is the real father; provided, however, that the confeſſion which he makes of carnal correſpondence, anſwers to the time of her delivery.

6.) If it be evident, that, during her pregnancy, the woman had a criminal correſpondence with ſeveral men, they ſhall all contribute by equal ſhares to the child's maintenance.

7.) If the father have run away, the child ſhall be put in poſſeſſion of his effects, out of which his maintenance ſhall be taken.

8.) If he had no effects, and could neither pay for the deſloration, nor afford annually a maintenance to the child, or had run away, his aſcendant relations ſhall maintain the child in the order preſcribed hereafter. And they cannot be diſpenſed from ſo doing, under pretext that their ſon was not the father of the child, becauſe the ſon by his flight declares, that he acknowledges the child for his own.

Moreover, he ſhall be reckoned to have run away when he ſhall have abſented during the pregnancy, and the place of his reſidence is not known.

9.) In caſe he offer to take the child home, and to educate it himſelf, the judge, before intruſting it to him, ſhall examine if he be capable, and if he have an opportunity of doing ſo conveniently; and in that caſe, the child ſhall be delivered into his hands, but he ſhall be bound to ſhow it in his own houſe to the mother and her relations, as often as they ſhall deſire.

10.) If the father be dead and have left teſtamentary heirs, they ſhall be bound to maintain the child,

and

and to pay what might be regulated for the defloration, and the expenſes that have been laid out.

If they had accepted the inheritance with the benefit of an inventory, the child's maintenance ſhall be taken out of the ſucceſſion, during the continuation of the ſuit, and till they have made their declaration.

11.) If one who has got a woman with child, die without making a will, this is the order in which his aſcendant relations are charged to take care of the child. It is firſt the father, and failing him, the mother, and their heirs. After their death, or if they be poor, this care ſhall belong to the grandfather, and after him, the grandmother on the father's ſide, and their heirs; in fine, failing them, or if they be unable to do it, it ſhall belong to the grandfather, and after him the grandmother on the mother's ſide, and their heirs, to maintain the child.

But none of them ſhall be obliged to pay any thing whatever for the defloration.

12.) If a man who hath got a woman with child, have tranſacted with her, with regard to the maintenance of the child, and have given her, once for all, a certain ſum; that ſhall not in any wiſe prejudice the child, whom the father, notwithſtanding of this, ſhall be bound to maintain, reſerving to himſelf recourſe againſt the mother and her heirs.

13.) In caſe he have fixed an exorbitant ſum for the maintenance of his baſtard, or for the defloration of the mother, his children and relations, but not his ſtranger heirs, may, after his death, petition to have the ſum moderated, and reduced to what equity requires.

14.) When two perſons ſhall marry within the forbidden degrees, and for that reaſon the marriage ſhall be diſſolved, the children ſhall be maintained by both parties; but if one of the two were ignorant of the relation,

relation, the other alone ſhall take the burden of the maintenance, unleſs the other be poor and unable to do ſo.

§ 67.

But that there may be no ſuits with reſpect to the portion of the perſon got with child, and the maintenance of her children; our will is, that,

1.) When ſhe ſhall be of an honourable condition, as if ſhe be the daughter of a gentleman, of a man in a civil employment, of a reſpectable merchant, or of a reſpectable tradeſman, the judge ſhould regulate the portion on the footing of what her father gave to his other daughters, or what he is obliged to give them according to his degree and fortune. But this portion ſhall not go beyond the fourth part of the ordinary portion. And as to the maintenance, it ſhall be regulated according to the degree of the perſon in fault, and the fortune of the man who has had converſation with her. If the queſtion be concerning workmen and other common perſons, the woman got with child ſhall be obliged to be ſatisfied with ten rix-dollars, for the defloration and expenſes laid out.

And with reſpect to the maintenance of the child, the father ſhall be obliged to furniſh it, at the rate of ten rix-dollars, which he ſhall pay annually, reckoning from the birth of the child, till it have attained the age of twelve years.

2.) If, after the twelfth year, the child be not in a condition to gain his bread, either becauſe it is ſimple or impotent, and ſeized with any bodily infirmity, it ſhall continue, during life, at the charge of the father or his heirs.

3.) If one ſhall think the ſum regulated for the portion too great, or too ſmall, he ſhall be at liberty to complain againſt the judgment paſſed on that head. But what ſhall be determined on the ſecond litigation, ſhall be ſtable and permanent. As to the

appeal

appeal from the judgment given with reſpect to the maintenance of the child, it ſhall have no other effect, but that which is called *devolved**, that is to ſay, that the execution of what is regulated, is to take place, notwithſtanding of the appeal, and while it is preparing for a ſecond hearing.

§ 68.

Foundlings ſhall be maintained at the expenſe of the judicatures, and not of the churches where they may be expoſed.

§ 69.

But to ſtop the progreſs of the crime of fornication, which becomes daily more common; our will is, that thoſe who ſhall be guilty of it, both men and women, be puniſhed arbitrarily; nevertheleſs, we prohibit the puniſhment of burghers and peaſants by pecuniary fines, and ordain that they be puniſhed corporally, by impriſonment, or condemned to public works, or in caſe of a relapſe, chained to a poſt, or put in the Spaniſh cloak, &c.

If a perſon of quality or other honourable condition, be ſeduced by a domeſtic ſervant, he ſhall be condemned to be impriſoned in a fortreſs for two years.

And the perſon of quality who ſhall have allowed herſelf to be debauched, ſhall loſe her ſhare of the fiefs which might have fallen to her.

* Quoad effectum devolutivum.

TITLE IV.

Of marriage-articles, or contracts of marriage.

(De pactis dotalibus.)

§ 1.

IT uſually happens, that, before the eſpouſals, the perſons who intend to marry, make marriage-articles, or contracts of marriage, the chief intention of which is, to regulate what concerns the marriage-portion, and its reſtitution after the diſſolution of the marriage. See above, book II. tit. I. § 4.

§ 2.

Marriage articles may be made before or after the eſpouſals, and even after marriage. Nevertheleſs, it is more ſecure to make them before the eſpouſals; becauſe the two parties, in caſe they cannot agree on the conditions, will be at liberty to deſiſt from any treaty. Whereas, when once the eſpouſals are publicly concluded, and it is not expreſsly agreed to paſs from marriage-articles, none of the parties can be bound to make any, and both the ſucceſſion of the ſpouſes and their other rights, ſhall be regulated as the laws preſcribe.

§ 3.

Marriage-articles, or contracts of marriage, are made with the conſent of both parties, and have the ſame force as all other agreements; conſequently they are to be executed, unleſs they contain clauſes which may give occaſion to the married perſons to commit ſin, or unleſs the agreement be in other reſpects contrary to good manners and the laws.

If

If then the husband should promise, by the contract of marriage, not to trouble himself with his wife's conduct; not to sue her for adultery, or robbery; not to revoke the donations which he may make during the marriage, &c.; all these agreements would be invalid and null of themselves. See art. I. § 42.

§ 4.

It shall not be necessary that the marriage-articles be taken down in writing, but it shall be sufficient if they be settled in presence of two witnesses.

§ 5.

These articles and agreements may also be made judicially, in which there will be no need of particular witnesses, because the judge and the clerk, or the person officiating for him, will come in place of the witnesses.

§ 6.

The same shall be the case when those agreements, passed without witnesses, shall afterward be registered in a court of justice; and, in this case, it shall not be absolutely necessary that the espoused persons appear themselves in person; but it shall be sufficient that the relations on either side, who have signed the contract of marriage, appear to get it recorded.

But if the record be made only by one of the parties, the covenants made without witnesses shall not thereby be rendered valid; unless all the others concerned agree, that they were indeed settled under the same conditions which the deed recorded bears.

§ 7.

Those kind of covenants may be made,

1.) Between the bride, or the wife, and the bridegroom, or the husband;

2.) Between the father of the bride, and the bride-

groom, or husband, even without calling the daughter, when the father settles a portion for her out of his own effects; but, if the portion is to be settled out of the daughter's effects, it is requisite that she give her consent to it.

3.) In fine, any stranger who settles a portion, may cause insert into the marriage-articles the conditions upon which he gives it.

§ 8.

When the marriage-articles contain clauses concerning the succession of the spouses, though expressions used in testamentary settlements be employed, the contracting parties obtain only the action on covenants *, or that which is called *præscriptis verbis*. And indeed it is not necessary to call five witnesses to them; and none of the parties is at liberty to revoke the settlement.

§ 9.

Matrimonial covenants may be made void like any other agreements.

§ 10.

The several articles which are the most usual objects of matrimonial covenants, have already been pointed out above: These are,

1.) The portion.
2.) The wife's paraphernalia,
3.) The proper effects, which are called *receptitia*.
4.) The donation on account of the nuptials.
5.) The dowery.
6.) The present made the day after the nuptials, which is called *Morgengabe*.
7.) The succession of the spouses, *&c.*

These several objects shall be treated in the following articles.

* Actionem ex pacto.

ART.

ART. I.

Of the right to the portion; when and how it may be redemanded; what the husband is entitled to deduce from it, and how far he is allowed to alienate it.

(*De jure dotium.*)

§ 11.

IN contracts of marriage the article of the portion is chiefly regulated. By a portion we understand, the right which the husband acquires to the effects which the wife brings him, for assistance to support the charges of the marriage.

§ 12.

Lawyers have divided the portion into *profectitious* and *adventitious*.

§ 13.

We call a *profectitious portion*, not only that which the father, in quality of father, allots out of his own proper effects to his daughter, when she is yet under his power; but also what a stranger settles out of regard to the father, when he declares in express terms, that he makes that settlement on the father's account.

§ 14.

An *adventitious portion* is that which does not arise out of the father's effects, and which a stranger gives out of his own good-will, without any regard to the father.

§ 15.

Thus when a father, or guardian, settles the portion out of his daughter's effects, or when she herself settles a portion out of her own effects, it is an *adventitious* portion; which would not change its nature, even though the father should become heir of the granter,

or though, having become his ſurety, he ſhould be ſued in that quality, and condemned to pay the portion promiſed by the ſtranger granter.

§ 16.

The ſettlement of a portion may be made either by eſtimate or without eſtimate. This eſtimate may be put upon it either ſimply, as an eſtimate of its value, or ſet rate, or elſe as a ſale-price.

When a land-eſtate which is rated, is given in portion with this expreſs condition, that the huſband ſhall be bound, after the diſſolution of the marriage, to reſtore the value of the rate; or when the eſtate is delivered to him, for example, for a price of a thouſand rix-dollars, the eſtimate is reckoned to have been put upon it as the price of the ſale made of it. And the huſband becomes thereby maſter of the eſtate; he may alienate it, and is only bound, after the diſſolution of the marriage, for the value at which it was rated.

All other eſtimates are reckoned to be made only for fixing the price or value of the thing. If then the granter declares, that he ſettles in portion ſuch a land-eſtate, which is worth, or is rated at a thouſand rix-dollars; the wife has the inheritance, or natural property of it, and the huſband has only the civil adminiſtration of it; conſequently he cannot alienate it.

§ 17.

The portion is uſually agreed upon before the marriage: it may nevertheleſs be alſo ſettled after the marriage; ſtill more may it be augmented, though the marriage be completed.

But this augmentation of the portion cannot be made to the prejudice of creditors, far leſs of the legitim. Whence it follows, that the privileged hypothec of the portion does not begin from the marriage,

marriage, but from the time that the augmentation was ſettled, or delivered. If then the huſband had ſquandered and alienated his effects, before granting the augmentation, there would be no action againſt the poſſeſſor, for that augmentation.

§ 18.

1.) A portion ſuppoſes marriage, becauſe there may be a marriage without a portion, but there can be no portion without marriage. If then marriage do not follow, and if, for example, the bridegroom die on the day of his nuptials, before the nuptial benediction, all the matrimonial gains ceaſe, even tho' there had been carnal correſpondence after the eſpouſals.

§ 19.

2.) A portion ſuppoſes a lawful marriage; whence it follows, that a left-hand wife can neither ſettle a portion, nor obtain a donation, on account of the nuptials. And indeed the effect of articles made with a wife of this order, though it be ſuch as obliges to fulfil the engagements entered into with her, does not extend to the privileges of a portion, and of a donation on account of the nuptials.

§ 20.

3.) It is requiſite that a portion be expreſsly ſettled as a portion, wherefore it cannot be ſettled tacitly; and when the ſettlement is doubtful, all the wife's effects are reckoned paraphernalia: which ſhall be ſpoken of more at length in the ſequel.

§ 21.

If then a wife puts all her effects into her huſband's hands to be adminiſtered, and leaves him the enjoyment of them, without mentioning a portion, all thoſe goods which ſhe has delivered to him are paraphernalia.

§ 22.

§ 22.

But a portion once ſettled may be tacitly renewed, (ſee § 17.). For example, if married perſons, after being ſeparated, be reconciled, and come together again, without ſettling any thing of new concerning the portion, the agreement made before the ſeparation ſhall be continued, and ſhall be held as renewed.

§ 23.

The portion is ſettled either by the bride or wife herſelf, or by the father, or by a ſtranger.

§ 24.

The bride-or wife may herſelf ſettle a portion, if ſhe be miſtreſs of her own fortune; but if ſhe be under the power of her parents or guardians, and curators, ſhe cannot do it without the conſent either of the father, or of the guardian, or of the curator.

Guardians and curators ſhall be bound to ſettle the portion according to the fortune of the bride, and ſtation of the bridegroom: and, to avoid giving occaſion for demands of entire reſtitution, the guardians and curators will act wiſely in getting it ſettled by the judge-ordinary. If the bride does not ſettle a portion before the nuptials, or brings no marriage-portion, ſhe cannot be obliged to ſettle any after the marriage, becauſe it may ſubſiſt without a portion. And notwithſtanding of this the huſband ſhall be bound to maintain her according to his ſtation.

§ 25.

A father is obliged to give his daughter a portion, even though he had not conſented to the marriage, and though his conſent had been ſupplied by the judge.

This muſt alſo be underſtood of daughters freed from the paternal power.

§ 26.

§ 26.

But the father ceaſes to be obliged to give a portion,

1.) When the two eſpouſed or married perſons renounce the portion; even though they ſhould afterward fall into poverty.

2.) When a daughter has already a ſufficient fortune, out of which to ſettle a portion ſuitable to the bridegroom's ſtation.

If the father who has the adminiſtration of his daughter's fortune, hath promiſed to portion her, without expreſsly declaring that the portion ſhall be taken out of his daughter's effects, he ſhall be bound to ſettle it out of his own proper effects. If he promiſe the portion both out of his own effects and out of his daughter's, he ſhall give but the half of the portion, unleſs he ſpecified the ſum which he intended to give out of his own money.

3.) When the daughter has been guilty of any action which gives ſufficient cauſe to diſinherit her.

4.) When the daughter has embraced a religion not tolerated by the peace of Weſtphalia: but the father cannot be excuſed from giving his daughter a portion, when ſhe changes from one tolerated religion to another which is equally ſo.

5.) When the father is himſelf reduced to poverty, and can ſcarcely gain a ſubſiſtence for his family.

§ 27.

When the father becomes furious or fatuous, or is made priſoner, or abſents himſelf, and the place of his reſidence is unknown, a truſtee ſhall be named, who ſhall determine the portion in place of the father; and this portion ſhall in like manner be a *profectitious portion.*

§ 28.

When the father's effects are confiſcated, the exchequer

chequer ſhall be bound to portion his daughter in proportion to the fortune confiſcated, and according to the ſtation of the bridegroom. And this becauſe the obligation of portioning the daughter is annexed to the father's effects, and paſſes with them to the exchequer.

§ 29.

A ſtranger, who ſhall adopt a child who is independent of the paternal power, as well as an aſcendant who ſhall adopt a deſcendant, ſhall be bound to portion the adoptive daughter; and the natural father ſhall not be obliged to contribute to it, unleſs the father by adoption be poor, and cannot ſettle a portion.

§ 30.

It ſhall not be neceſſary to regulate a portion by the legitim, far leſs can it be reckoned to come in place of a legitim. If then, after the father's death, the daughter think herſelf wronged in her legitim, ſhe may ſue to have it ſupplied; but, in like manner, when ſhe is appointed heir for her legitim, ſhe ſhall be bound to reſtore what ſhe has received too much by her portion.

§ 31.

If the father ſhould give a conſiderable portion to his daughter, and afterward become bankrupt, the huſband ſhall not be obliged to reſtore the portion, neither in whole nor in part, under pretext that the father gave it to defraud his creditors; provided always, that the ſon-in-law and his wife be bound to give oath, that they were ignorant of the bad ſituation of their father's affairs.

But if the portion were only promiſed, the huſband ſhall be ranked in his place, in conformity to what is preſcribed by the ordinance concerning the competition of creditors.

§ 32.

§ 32.

If the father and the daughter, or the ſon-in-law, cannot agree with reſpect to the portion, the judge ſhall determine it, and ſhall ſettle it in proportion to the father's fortune, and according to the number of children, and the condition of the bridegroom, even though in the contract of marriage the father ſhould have promiſed a portion in a general and undetermined manner.

And to avoid any diſpute on the account of the father's effects, he ſhall be obliged to give in a particular account of his annual income and expenſe, upon oath, which ſhall be deciſive; and the judge ſhall found upon his declaration, in determining, according to juſtice, a certain ſum for the portion.

If either of the parties appeal from this judgment, the appeal ſhall indeed take place; but, till the ſuit be ended, the appellant ſhall be bound to pay the intereſt of the ſum ſettled, or to accept the ſum to account. And whatever ſhall be decreed on the ſecond hearing, ſhall have its full and entire effect, without any remedy at law to the contrary.

§ 33.

If the father be poor, the grandfather by the father's ſide ſhall be bound to ſettle the portion, under the ſame reſervations and privileges as the father.

But if the marriage come afterward to be diſſolved, it is not the father, but the grandfather, who has a right to redemand the portion.

§ 34.

The mother is not obliged to employ her own fortune to portion her daughter.

1.) Unleſs the daughter, after attaining the age of twenty-five years, have not found an opportunity of marrying without a portion; in which caſe the mo-

ther ſhall be bound to portion her, when a ſuitable match ſhall offer:

2.) Unleſs the daughter change from a religion not tolerated in the empire to one of the three which are there received. If then a Jeweſs ſhould turn Chriſtian, her mother will be bound to ſettle a portion upon her.

But this obligation ſhall ceaſe in the caſes mentioned with reſpect to the father, in § 26. n. 2. 3. and 5.

If the mother, as well as the father, promiſe a portion, the mother ſhall only be bound ſubſidiarily.

§ 35.

A brother is ſtill leſs obliged to portion a ſiſter, and cannot be bound to give her any thing but what the conſtitutions concerning fiefs grant to daughters.

§ 36.

Daughters born of a left-hand marriage cannot exact any portion from their father; but they ſhall be obliged to be ſatisfied with what is granted to their mother with the ſovereign's approbation.

§ 37.

Daughters born in inceſt or adultery can require nothing of their father but maintenance; unleſs, in the caſe of inceſt, the father and mother, when they married, were ignorant that they were relations within the degrees prohibited.

§ 38.

III. A ſtranger may likewiſe ſettle a portion; and on this occaſion it is to be obſerved, that, under the name of a ſtranger, we comprehend even the mother and the brothers.

If a ſtranger do not ſettle the portion with a deſign to make a donation, he may ſue the father, by an action *for buſineſs done*, or for what was employed for

for the benefit of his affairs, an action which is called *negotiorum geſtorum et de in rem verſo.*

§ 39.

A portion may be ſettled, either by a covenant (or a promiſe), or by a ſettlement in a will, or elſe by real delivery.

§ 40.

When a portion is ſettled by a covenant (or a promiſe), it is requiſite that both parties conſent to it, and that the huſband accept the portion. Wherefore we declare, for the future, null, and of no effect, any promiſe made only* on the ſide of one party.

§ 41.

To contracts of marriage may alſo be added covenants, or particular agreements, whether immediately or at ſome diſtance of time.

§ 42.

Before agreeing on the portion, the contracting parties may annex to it at their pleaſure clauſes and conditions, even though, in conſequence of theſe clauſes, the daughters might remain without portion, or though the condition of the portion ſhould be rendered worſe by them. See above, § 3.

a) Whence it follows, that covenants or agreements are valid, by which a wife conſents that her huſband be anſwerable with reſpect to the portion only for his own fraud; that the portion cannot be redemanded, neither from himſelf nor from his heirs, *&c.*

b) As well as the clauſe, in virtue of which the huſband would come to loſe the enjoyment of the portion; as if he had promiſed that the income of the portion ſhould be added to, and make a part of it.

* Per pollicitationem.

But theſe covenants would be invalid, if they contain clauſes againſt good manners, or againſt the laws. Thus a covenant, by which a party ſhould engage never to revoke the portion, for any cauſe whatever, not even on account of adultery, would not be valid, *&c.* See § 3.

§ 43.

When the portion ſhall once be ſettled, no conditions can be annexed to it, nor changes made in the contract of marriage, but with conſent of the parties concerned.

Thus, when the father ſhall treat alone concerning the portion with the huſband, and ſhall agree upon it, and thereby the daughter ſhall acquire a right, neither the father nor the huſband can make any alteration in it, without the conſent of the daughter; even though the change ſhould turn to her advantage, becauſe the daughter cannot acquire a right or an action from a covenant made by her huſband *.

But if a father, who, without the conſent of his daughter, has agreed with the huſband, with reſpect to the portion upon ſome particular conditions, ſhould, after the diſſolution of the marriage, redemand the portion; he ſhall be bound to fulfil the engagements into which he entered by that covenant.

Neither can the daughter agree upon any thing which may prejudice the father, nor the huſband, nor a ſtranger: ſhe may however meliorate the father's condition; a covenant which is regarded as an inſtrument granted by nature to a father. (See book I. tit. IX. art. II. § 23.).

But if the father, after the diſſolution of the marriage, proſecute jointly with his daughter, he ſhall be bound by the daughter's covenant.

* Ex pacto tertii.

§ 44.

§ 44.

If a wife ſettle a portion out of her own proper fortune, and would afterward alter it, ſhe cannot do it without the conſent of her huſband.

§ 45.

If it be a ſtranger who has ſettled a portion, he cannot alter it without the conſent of the two married perſons, nor even meliorate the condition of the wife, or of her portion, without her knowledge.

§ 46.

If the payment of the portion were to be made at the time fixed for that purpoſe, for example, in eight months; and if the wife die within that ſpace, the year's income ſhall belong to the huſband, in proportion to the time that the marriage ſubſiſted. But it is plain, that if by the covenant the huſband is to get the portion, he acquires the property of it.

§ 47.

If the huſband, reckoning immediately to receive the portion, grant an acquittance of it, as if he had effectually received it; it ſhall be allowable both for himſelf and his heirs, to avail themſelves, within the ſpace of year and day, reckoning from the date of the acquittance, of the exception of a portion not paid *. But this exception ceaſes,

1.) If the huſband allow that ſpace to elapſe without aſſerting his right;

2.) If the huſband in the acquittance renounce that exception:

3.) Or if the portion was only promiſed, and afterward the huſband acknowledge, by particular acquittance, that it was paid to him.

4.) If the judge, or even a notary, together with

* Non numeratæ dotis.

two

two witneſſes, certify that the portion was paid in their preſence.

In all theſe caſes the portion is reckoned to have been paid, and received by the huſband *; but the ſame thing does not take place with reſpect to creditors. Thus, if there be a competition on the huſband's effects, the payment of the portion cannot be proved by the huſband's acquittance, nor by his confeſſion, nor by the ſuppletory oath of his wife; but it muſt be proved by a judicial deed, or acquittance, proving that payment of it was made in preſence of the judge. (See the Fred. Code, p. 4. t. 9. § 79. and following).

§ 48.

The portion may alſo be ſettled by delivery, which happens when it is put into the huſband's hand, and he declares his acceptance of it.

This delivery may alſo be made by ſymbols, when the portion conſiſts of incorporeal things, as in debts or capital ſums laid out on intereſt, or otherwiſe. Delivery is alſo made by ceſſion of the obligation, and of the debt; but in this caſe the huſband acquires no greater right than he had who made the ceſſion.

§ 49.

Every thing which enters into commerce, that is to ſay, which may be put to profit in ſociety, may be given for a portion, be they preſent or future, moveable or immoveable, corporeal or incorporeal. Wherefore alſo debts, active or due, may be ſettled for a portion, future ſucceſſions, and even what a huſband owes to his wife, &c.

§ 50.

A wife may alſo ſettle all her fortune for a portion, provided the legitim be left to thoſe to whom

* Pro ſoluta et illata.

it

it is due, by virtue of the preſent body of law; failing which they would have the exception of undutifulneſs *, which takes place with reſpect to donations made to the prejudice of the legitim.

But by the wife's fortune are meant, in this caſe, only her preſent effects, and not thoſe which ſhall be acquired after the ſettlement of the portion; which conſequently are not comprehended in the portion.

And if a woman find herſelf wronged by ſuch ſettlement of a portion, ſhe may get herſelf relieved of it, and may redemand her fortune, either in whole or in part, according to the nature of the circumſtances.

§ 51.

A thing yet in controverſy may be ſettled as a portion, without regard to what is called *vitium litigioſi*; that is to ſay, without the bridegroom or huſband having it in their power afterward to take advantage of the exception, that the portion was allotted upon things in controverſy.

§ 52.

A father may alſo give in portion to his daughter a feoffment in truſt, when it is of a nature to be tranſmitted to females, becauſe it remains in the family: but if it be a feoffment in truſt to which males alone can ſucceed, the huſband would only enjoy the fruits as long as the granter, or his heirs-male, who are bound for their father's deeds, were ſtill alive; for after their death the feoffment in truſt would fall to be divided among the agnats.

§ 53.

A portion may likewiſe conſiſt in a leaſehold eſtate †; but it takes place only during the life of the

* Querelam inofficioſæ donationis.

† In bonis emphyteuticis.

granter

granter of the leaſe, and his heirs: after their death the lands return to their proprietor.

§ 54.

In fine, fiefs may alſo be given for a portion by a father, if they be feminine fiefs: but if they be maſculine fiefs, the portion will ſubſiſt only during the life of the vaſſal and his heirs-male.

§ 55.

Moreover, there is no neceſſity in any of theſe caſes for the conſent of the perſon to whom the feoffment in truſt is to be reſtored, nor of the proprietor of the leaſehold eſtate, nor of the ſuperior of the fief.

1). Unleſs the feoffment in truſt, or the leaſehold eſtate, or the fief, be valued at a certain price in the ſettlement of the portion.

2). Or unleſs in the contract of marriage it be agreed, that the huſband ſhall keep the portion after the diſſolution of the marriage.

§ 56.

When one gives for a portion an uſufruct which he has, the huſband becomes the real uſufructuary, and the right of uſufruct paſſes to him perſonally.

But it would not be the ſame if one gave, in place of a portion, only the uſe of the ſubject of which he has the uſufruct.

§ 57.

One may even give in portion a thing which belongs to another; but the huſband acquires thereby only a right of preſcription: ſo that the huſband may continue the poſſeſſion *bona fide*, or fairly, begun by the granter; or if his right be not good, begin himſelf a new poſſeſſion, and acquire the dotal fortune by preſcription.

§ 58.

One may likewiſe give for a portion things which are

are conſumed by uſe, in which caſe it is ſufficient, after the diſſolution of the marriage, to reſtore them in the ſame quantity, of the ſame kind, and of the ſame goodneſs.

And if the portion were valued at a certain price, the huſband ſhall only be bound to reſtore the price.

§ 59.

One may even give in portion an uncertain thing; as if one promiſe a portion in general, and without determining a certain ſum, or naming the funds for the portion.

In this caſe a diſtinction is to be made, whether it be the father, or a ſtranger, who gives ſuch a general promiſe. In the firſt caſe, the judge ſhall regulate and determine the portion, if the father and the ſon-in-law cannot agree between themſelves; and this regulation ſhall be made in conformity to what is preſcribed in § 32.: but if the queſtion be with a ſtranger, § 32. cannot indeed ſerve for a rule to the judge; nevertheleſs, neither ſhall the thing entirely depend on the pleaſure of the perſon who made ſuch a promiſe, but the judge ſhall examine what equity requires in ſuch a caſe; for it is preſumeable that the huſband was induced by the promiſe to engage in the marriage.

§ 60.

A perſon to whom a portion has been promiſed, and his heirs, have right to the following actions.

I. An action of covenant or agreement againſt the perſon who promiſed the portion, and his heirs, to get them decreed to pay the promiſed portion, with intereſt, coſts, and damages, and the penalties ſtipulated: if the queſtion be with the father or grandfather, he ſhall be bound to pay intereſt from the concluſion of the marriage; but if it be with a ſtranger, intereſts cannot be demanded till after the expiration of a year.

Moreover, it would be a ſuperfluous queſtion to aſk if this action be an action of *bona fides*, or of ſtrict law, *ſtricti juris?* or if the agreement be a covenant or contract? becauſe, for the future, all agreements, be they made by way of covenant or by contract, ſhall be of force to infer an obligation; and becauſe in all engagements regard ſhall be had to what is honeſtly agreed *.

When the perſon who promiſes the portion ſettles an hypothec or mortgage on the huſband, he ſhall have,

II. An action of hypothec or mortgage againſt any poſſeſſor whatever of the hypothecated effects or mortgaged eſtate; and may require from him the portion, with intereſt, coſts, and damages, and even the penalty agreed.

If a thing which belongs to another have been promiſed for a portion, the huſband may,

III. Raiſe the action called *præſcriptis verbis*, that ſomething elſe may be given him for a portion; and if the granter knew that the thing was not his own, he may be obliged, by the action for a portion, to indemnify the huſband of all loſs, damage, and intereſt.

IV. If the portion were promiſed by a teſtamentary ſettlement, one has right to all the actions reſulting from a laſt will, or from a valid legacy.

V. When a huſband has given ſurety to his wife, to her father, or to a ſtranger, to aſcertain them that the portion which they have ſettled ſhall be reſtored to them after the diſſolution of the marriage, they and their heirs are intitled to the action ariſing from ſuretiſhip † againſt the ſurety and his heirs.

§ 61.

In caſe the wife, the father, the grandfather, or the ſtranger, do not pay the portion promiſed, that

* Auf Treu und Glauben. † Ex fidejuſſione.

ſhall

ſhall not be a reaſon for authoriſing the huſband to put away his wife, or for refuſing her what is neceſſary for her maintenance.

§ 62.

If to obtain the portion promiſed by the father and grandfather diſtreſs be uſed, they ſhall be allowed the benefit of competition *.

§ 63.

In fine, he who has promiſed a portion, alone bears the loſs of it, when it happens before delivery, and is anſwerable either for the portion, or the value of it. We ſhall mention afterwards, p. III. the caſes which are to be excepted from this rule.

§ 64.

Thus far we have ſettled what is to be obſerved when the portion is only promiſed; but when it is really delivered, that is to ſay, carried and given over to the huſband; thence reſult ſeveral effects, of which we are now to treat.

§ 65.

The huſband acquires the civil property of the portion delivered to him, and conſequently the right of enjoying it.

I. Thus he enjoys the fruits and all the uſe he can make of the portion, and of its augmentations, (under which we comprehend the treaſures which he may find, minerals, &c.); but, on the other ſide, he is obliged to take upon him the public burdens.

II. He is to preſerve the dotal fortune, and its augmentations, and take the ſame care of it as a careful and diligent maſter of a family has of his own affairs.

If the huſband was accuſtomed to take a very particular care of his own effects, he muſt give the ſame care and attention to the dotal fortune.

* Beneficium competentiæ.

III. When the dotal fortune is eſtimated at a certain value, as a ſale-price, it is the huſband who ſuffers the loſs, if it happen to periſh during the marriage; and after the diſſolution he is obliged to reſtore its value to his wife, independently of this loſs, unleſs his wife had taken upon herſelf all mere chances.

IV. If a wife and her father have *bona fide* and unknowingly given for a portion a dotal fortune which belongs to another, the huſband cannot ſue them by an action of warranty to obtain all his damages and intereſt; he can only demand that they be obliged to ſettle another portion of the ſame value: but if the granters have done it knowingly, they ſhall be anſwerable for all damages and intereſt.

When a ſtranger honeſtly and unknowingly gives in portion a thing which belongs to another, he cannot be bound, in caſe of eviction of the dotal fortune, to ſettle another portion; but if he knew that he was not the owner of the thing given, an action of fraud may alſo be raiſed againſt him *.

In caſe the dotal funds which belong to another have been eſtimated at a certain value, as a ſale-price, and come to be evicted, the perſon who gave them for a portion ſhall be bound to pay the huſband only the value and intereſt due.

V. A huſband is intitled to all the actions ariſing from the civil or uſeful property: wherefore he may, during the marriage, keep himſelf in poſſeſſion by interdicts or ſuſpenſions, or actions which the laws allow on account of poſſeſſion. He may claim the dotal fortune from any poſſeſſor, proſecute a ſtranger-robber in an action of robbery, and even intent againſt his wife an action for things put out of the way and alienated †. He has likewiſe the action called *de damno injuria dato*; alſo an action of public ſale.

* Actio de dolo.

† Actionem amotarum rerum.

VI. A

VI. A huſband may alienate a portion conſiſting in moveables, or diſpoſe of it at his pleaſure; and after the diſſolution of the marriage he is only bound ſimply to reſtore its value, ſuch as it has been eſtimated and proved.

But with reſpect to a dotal fortune, which conſiſts,

1.) In an immoveable ſubject, a diſtinction muſt be made, if it were eſtimated at a certain value, as a ſale-price; or if it were not eſtimated; or if having been ſo, the eſtimate of it were made only to ſhow the value, not as a ſale-price.

2.) When the dotal eſtate is eſtimated at a certain value as a ſale-price, the huſband has the full property of it, and is bound, after the diſſolution of the marriage, only for that price. Conſequently he may alienate the dotal eſtate as he pleaſes:

a) Unleſs it were reſerved to the wife to exact the price, or to reſume the dotal eſtate itſelf:

b) Or, unleſs the huſband, having fallen into indigence, were not in a condition to pay its value.

3.) But when the dotal eſtate is not eſtimated, or the eſtimate is affixed only to ſhow its value, and not as a ſale-price, the wife preſerves the natural property of the dotal eſtate, and the huſband cannot alienate it.

4.) This alſo takes place when the money of the portion is employed to purchaſe an immoveable ſubject, and the purchaſe is made in the name of the wife.

5.) All the ways of alienating the dotal fund in queſtion, are then prohibited. Wherefore it cannot be mortgaged, nor ſubjected to a ſervitude, nor can a ſervitude be given up which is annexed to it. Neither can the huſband cauſe it to ceaſe from being common, far leſs can he leave it in a legacy by a teſtamentary ſettlement.

6.) If then a portion conſiſting of ſuch a ſubject, (whether

(whether ſettled by the wife, or by the father, or by a ſtranger), ſhould be alienated by the huſband, that alienation ſhall be null and of no effect, and the wife ſhall have a right to redemand it from the poſſeſſor, either in the huſband's lifetime, or after his death.

7.) This ſhall alſo take place, even though the wife ſhould conſent to it at different times, and even upon oath; for there is a legal preſumption that the conſent is extorted, and given out of dread of the huſband.

If the wife find her advantage in the alienation of the dotal eſtate, and if ſhe freely give her conſent to it, ſhe ſhall be obliged to do ſo before the judge, who ſhall maturely weigh all circumſtances.

But if in this examination the judge obſerve that the alienation is made only to pay the huſband's debt, or if otherwiſe the wife run a riſk of loſing her fortune, he ſhall by his own authority interdict and ſuſpend the alienation of the dotal eſtate; except, in theſe caſes, he ſhall allow the alienation, after taking the wife's oath that ſhe voluntarily and freely conſented to it, and that ſhe was induced to do ſo neither by threatening, nor by harſh words, nor out of fear of being maltreated by her huſband, *&c.*

When the judge ſhall approve the alienation, the precognition or the information which he ſhall take, and the decree which he ſhall give upon it, ſhall be delivered to the wife, that ſhe may give them to the purchaſer for his ſecurity.

If the portion be ſecured on the huſband's eſtate, and the mortgage for it recorded in the regiſter of mortgages, it cannot be effaced, even with the wife's conſent, if the judicial act mentioned be not produced with the conſent of the judge.

8.) A bride who has put her bridegroom in poſſeſſion of an immoveable ſubject, which ſhe has ſettled

tled for a future portion to herſelf, has the ſame rights as a wife.

9.) Reclamation, redemand, or challenge *, likewiſe takes place, when the huſband's effects come to be confiſcated.

10.) A wife may even raiſe an action of reclamation, or challenge, againſt a huſband who has alienated the dotal funds; becauſe it is by fraud that he ceaſed to poſſeſs them. And the effect of this action will be, that the wife ſhall be admitted to give, with reſpect to the dotal fund alienated, the oath called *juramentum in litem.*

11.) If a wife reclaim or redemand the dotal ſubject, the purchaſer may ſue the huſband, in quality of ſeller, to oblige him to anſwer for the eviction, and to be accountable to him for all damages and intereſt. The caſe muſt be excepted, where the purchaſer knew that it was a dotal ſubject; becauſe then the ſeller could be bound only to reſtore the purchaſe-money.

12.) Moreover this alienation is made valid,

a) When the huſband, after the diſſolution of the marriage, gains the portion, and becomes the real proprietor:

b) When the wife being dead, her children and heirs become alſo the huſband's heirs.

c) When the alienation was made from neceſſity, and for the manifeſt advantage of the wife, and immediate proof can be brought: as if the price were employed to pay the wife's debts, and there were no other method for diſcharging them; or if the dotal funds were exchanged for a better acquiſition, *&c.*

§ 66.

A wife who really brings a portion to her huſband,

* *Revendication.*

reſerves

reſerves the natural property * of it, of which this is the effect:

I. The wife reſerves a real right in the portion; conſequently ſhe may, after the diſſolution of the marriage, demand the moveables which make a part of it from the huſband's heirs, when theſe moveables are found in kind among his effects. And as to the portion which conſiſts in an immoveable ſubject, ſhe may redemand it from all thoſe who are in poſſeſſion of it.

II. All augmentations and additions to the portion belong to the wife, by virtue of her right of natural property.

III. Treaſure found in the dotal eſtate belongs likewiſe to the wife, as much as a treaſure belongs to the proprietor of the lands in which it was found.

IV. A wife, as natural proprietor, bears the loſſes and diminutions which happen to the portion by mere chance, or by a very ſlight fault of the huſband:

Unleſs a) The portion be eſtimated at a certain value;

b) Or the huſband be the occaſion of the loſs by one of thoſe faults which lawyers call ſlight †; that is to ſay, unleſs he did not take care of his wife's fortune, as much as a good maſter of a family takes of his own proper affairs.

V. By virtue of this natural property, wives have ſeveral privileges in competitions.

a) If the dotal fortune exiſt in kind, a wife has the preference over all other creditors.

But when it no longer exiſts, ſhe ſhall be ranked in the fourth claſs, among the privileged creditors.

b) If the portion were paid in money, on con-

* Dominium naturale. † Culpam levem.

dition

dition of its being employed in the acquiſition of an immoveable ſubject, and if the immoveable were bought with that money, the wife ſhall in like manner have the preference over the other creditors; if care have been taken to cauſe inſert into the record of mortgages, that the immoveable ſubject was purchaſed out of the money of the portion.

If then a huſband buy an immoveable ſubject in his own name, and lay out on it the money of the portion, without cauſing to be inſerted in the record of mortgages that it was purchaſed with his own money, the wife will have but a tacit hypothec, and the perſonal privilege upon her huſband's effects.

c) This right of preference, or privileged hypothec, is transferred by wives only to their heirs in a deſcending line, and cannot conſequently be reſigned to a ſtranger, who cannot obtain any but the right of ordinary hypothecs.

d) In all theſe caſes the wife is ſuppoſed to have proved, that ſhe really brought the portion at marriage; but ſhe ſhall not be bound to prove that it was really employed.

As to the proof that the portion was really brought and delivered, it cannot be made with reſpect to creditors, either by the huſband's acquittance, or by the ſupplementary oath of the wife. But if ſhe want to be admitted to the enjoyment of the preference juſt mentioned, ſhe ſhall take care, that the judge take cogniſance of it; and deliver to her a judicial acquittance, both with reſpect to the portion and its augmentations.

§ 67.

The portion being given to the huſband only as an aſſiſtance for bearing the charges of the marriage, it follows, if the marriage be not completed, or be de-

clared null and diſſolved, that the huſband's right ceaſes, and the portion may be redemanded.

§ 68.

If then, before completion of the marriage, the portion had been delivered, and the marriage afterward did not take place, the perſon who had delivered the portion may claim it, by virtue of his right of property; or redemand it by an action called *condictio ſine cauſa*, or cauſeleſs citation, if the portion no longer exiſt in kind.

§ 69.

So long as the marriage ſubſiſts, the portion cannot be redemanded, except in the following caſes.

1.) When the huſband happens to ſquander his effects, ſo that they are no longer ſufficient to anſwer for the portion, or when it is to be dreaded that they ſhall become ſo in the ſequel.

And, in this caſe, the huſband ſhall be bound either to reſtore the portion, or to give ſufficient ſecurity to his wife.

But if the wife were not ignorant that her huſband was in debt, and accuſtomed to ſpend above his income, ſhe cannot redemand the portion; but ſhe ſhall have a right to oblige the huſband to give ſecurity, or to require that the portion be put under ſequeſtration.

And to avoid the accuſation of prodigality, raiſed by the wife, from giving occaſion to tedious law-ſuits, it ſhall be ſufficient if ſhe bring a half-proof of it.

2.) When the wife redemands the portion, or a part of the ſame, to aſſiſt her relations, who may have become poor, and when that can be done without the huſband or his family ſuffering by it. At any rate, the judge ſhall take cogniſance of it.

3.) When the huſband's effects happen to be confiſcated.

fiſcated during the marriage, the exchequer is obliged to reſtore the portion to the wife.

4.) When the marriage is declared null or diſſolved, it is underſtood that the portion ceaſes, and is to be reſtored. See concerning this, tit. III. § 34. at the end.

§ 70.

After the diſſolution of the marriage, the portion may be redemanded,

I. By the wife, if it were ſettled out of her money.

§ 71.

II. By the father, when it was provided out of his fortune, or when another gave it in the father's name; and in theſe caſes the father may redemand it, either in his own name, or in name of his daughter, or in name of both, even though he had not reſerved to himſelf a right of reverſion.

If the father will not redemand the portion, or neglect to do ſo, the daughter ſhall have a right to it.

§ 72.

III. By a ſtranger, when it has been ſettled out of his fortune, and *N. B.* when he has reſerved to himſelf a right to redemand it.

§ 73.

If the marriage be diſſolved by the huſband's fault, and if the portion were ſettled out of the wife's money, ſhe may alone, or her father for her, redemand both the portion and what was granted by the donation on account of the nuptials. See tit. III. § 38.

If it be by the wife's fault that the marriage is diſſolved, neither ſhe nor her father can redemand the portion, *Ibid.*

§ 74.

When the father has ſettled the portion out of his

own fortune, he may redemand it after the diſſolution of the marriage, even though the marriage were annulled by the wife's fault; unleſs the father were dead before the divorce, in which caſe the huſband, as the innocent party, would gain the portion.

§ 75.

When it is a ſtranger who has furniſhed the portion, and when he has reſerved to himſelf a right to redemand it, he and his heirs may claim it from the huſband, even though the wife were the occaſion of the divorce.

§ 76.

When the marriage is annulled on account of adultery, the guilty party does not loſe the portion, if the other party have likewiſe become guilty of the ſame crime, and be convicted of it; provided always that the fault has not been pardoned.

In the ſame manner, the huſband, who finding his wife in the fact, ſhould kill her, would not get the portion, becauſe he would do himſelf juſtice.

§ 77.

The portion is to be reſtored, with all the fruits which the poſſeſſor has enjoyed, after the diſſolution of the marriage.

And as to the fruits of the laſt year, they ſhall be divided proportionally, ſo that after having made a maſs of all that the dotal fortune has produced, comprehending in it both the fruits natural and civil, and thoſe owing to induſtry, it may be divided in proportion to the time of the laſt year that the marriage has continued undiſſolved.

§ 78.

Beſides, the huſband and his heirs are bound for all damages that have happened to the dotal fortune, by the huſband's fault, when he has not employed, in the

the adminiſtration of it, the ſame care and diligence that a good maſter of a family has about his own affairs, and which is called *ordinary diligence* *. See above, § 65.

If any damage happened to the dotal fortune, either by mere chance, or becauſe the huſband had not preſerved it with the moſt exact diligence †, he cannot be made anſwerable for it, unleſs the portion had been eſtimated at a certain value. § 65. *ibid.*

When the portion is rendered worſe by the colluſion or fraud of the huſband, the wife may aſcertain the damage by the oath called *juramentum in litem.*

If the wife delay to redemand the portion, and in the mean time the dotal fortune happen to ſuffer any damage, the huſband ſhall only be bound for his own fraud; but if the huſband delay, he ſhall be obliged to employ in his adminiſtration the greateſt diligence, and he ſhall be made anſwerable for the ſlighteſt fault ‡.

§ 79.

Thoſe who have a right to redemand the portion after the diſſolution of the marriage, have ſeveral actions.

1.) They are intitled to the action ariſing from compact, when they have reſerved to themſelves the right of redemanding the portion.

2.) And the action called *condiction of the law*, or perſonal, for recovery of demands ‖, when they have not reſerved to themſelves that right.

3.) They have an action of mortgage, or hypothec, becauſe by the ſettlement of the portion a tacit hypothec or mortgage is obtained over the huſband's effects.

4. And an action of purchaſe or ſale, when the

* Mediam diligentiam.
† Diligentia exactiſſima.
‡ Culpa leviſſima.
‖ Condictio ex lege.

portion

portion was eſtimated at a certain value, as a ſale-price.

5.) When the widow after her huſband's death is in poſſeſſion of the portion, and is diſpoſſeſſed or moleſted in her poſſeſſion, ſhe may raiſe poſſeſſory complaints *.

6.) A wife has alſo a right to retain her huſband's effects till ſhe have got her portion, and her other effects: but in this caſe ſhe ſhall give an account of her adminiſtration; unleſs ſhe had taken or given judicially her huſband's effects in farm, in which caſe ſhe would be bound to give an account of the rent or price of the leaſe.

But the right of retention ſhall not take place, if the claim for the portion be not clear, and if the heirs give ſecurity. Moreover, it is the buſineſs of the judge to declare whether the portion be clear, and the ſecurity ſufficient.

§ 80.

All theſe actions may be made over by the wife to a third party.

§ 81.

When a perſon who has ſettled a portion happens to die after the diſſolution of the marriage, before having raiſed any action, the heir ſhall have a right to redemand the portion: but this is underſtood only of the heirs who are of the granter's family, and by no means of ſtranger-heirs, who are excluded from this right.

If the marriage be annulled by the fault of one of the ſpouſes, and the innocent party do not redemand the portion in his or her own lifetime, it is preſumed that a preſent is made of it, and the rights made over to the guilty party.

But if the heirs could prove that the defunct was

* Remedia poſſeſſoria.

ſurpriſed

ſurpriſed by death, and that otherwiſe an action would have been intented, they may proſecute the defunct's right. And any one who dies within ſix months, reckoning from the divorce or effectual ſeparation, is eſteemed to be ſurpriſed by death. Heirs ſhall likewiſe have a right to continue the proſecution of a ſuit begun by the granter, if ſuch granter happen to die while the cauſe is in dependence.

§ 82.

When there is occaſion to reſtore the portion, it muſt be done, if it be an immoveable ſubject, immediately, and retention cannot be claimed under pretext of having made meliorations, the ſubject itſelf being a ſufficient ſecurity to the huſband: but if the portion conſiſt in moveables, they ſhall be reſtored within the ſpace of two months.

§ 83.

Neither the huſband nor his heirs ſhall reſtore the portion,

1.) If it be agreed in the contract of marriage, or otherwiſe, that the huſband ſhall get the portion after the wife's death:

Which is preſumed whenever the portion has been ſettled by a ſtranger, who has not reſerved the power of redemanding it.

2.) When a man who marries a girl, whom he believed a virgin, and who paſſed herſelf for ſuch, diſcovers afterward that he has been abuſed, and when for this reaſon he gets the marriage annulled.

3.) When the portion periſhes without the huſband's fault, unleſs it was eſtimated at a certain value.

As to faults for which the huſband is bound, they are ſpoken of above, § 65. and 79.

4.) When the marriage is annulled by the wife's fault. See tit. III. § 38. and above, § 74.

§ 84.

§ 84.

If the huſband be inſolvent, he may claim to be admitted to the benefit, which is called, in theſe countries, *of competition*; in virtue of which he cannot be bound to reſtore the portion to his wife, and her heirs, but in as far as his effects will permit, and ſo as there ſhall always be left him what is abſolutely neceſſary for his own ſubſiſtence.

1.) This benefit belongs alſo to the children of their marriage, and who are the father's heirs; but not to ſtranger-heirs.

2.) A father-in-law, who, after having promiſed a portion, falls into poverty, and even a ſtranger, who had engaged himſelf to furniſh a portion out of generoſity, and with a view of making a preſent, and who may afterward find himſelf out of condition to pay it, may each of them avail themſelves of the benefit of competition.

3.) The huſband however cannot be admitted to this benefit, if he have converted the wife's effects to his own uſe, and complaint have been made; if he have ſquandered his own fortune to put himſelf out of condition of reſtoring the portion to his wife; or if the wife herſelf be reduced to indigence and want of neceſſaries; or if the dotal fortune ſtill exiſt in kind, and be redemanded.

4.) The father-in-law and the ſtranger, who have promiſed more than they were in a condition to give, ſhall neither of them be admitted to enjoy the benefit in queſtion.

§ 85.

When, after the diſſolution of the marriage, the huſband is obliged to reſtore the portion, he may deduct from it the expenſes which he ſhall have laid out on its account.

§ 86.

§ 86.

The expenſes which may be laid out on that occaſion are of three ſorts; namely,

1.) Neceſſary expenſes;

2.) Uſeful expenſes; and,

3.) Expenſes laid out ſolely for pleaſure.

§ 87.

Neceſſary expenſes are thoſe without which the dotal fortune was in danger of being ruined or waſted.

If the number of neceſſary expenſes muſt not then be reckoned thoſe which are daily incurred for the preſervation of the ſubject, and purely for ſmall reparations, no more than thoſe which the huſband lays out to enable him to enjoy it; ſuch as ſervants wages, coſts of law-ſuits, *&c.*: far leſs can he put to account public burdens, which he is to pay during the marriage.

The huſband may deduct from the portion the neceſſary expenſes, even though afterward the meliorations ſhould happen to be deſtroyed without any fault of his.

If the huſband forget to deduct the expenſes, and ſhall reſtore the portion entire, he may nevertheleſs demand them afterward, by means of an action, called *a demand of what is not due* *.

§ 88.

Uſeful expenſes are thoſe which procure a conſiderable advantage to the wife, *&c.*; for example, If a barn be built for an eſtate in the country: this expenſe is nevertheleſs uſeful, though the eſtate would not have been waſted, though that building had been neglected to be made. If, after the diſſolution of the marriage, they ſhould not agree concerning the uſefulneſs of the expenſes, the huſband cannot retain the

* Condictio indebiti.

dotal fortune under pretext of neceſſary expenſes laid out by him, but he ſhall get thoſe difficulties ſettled in a ſeparate proceſs, which he ſhall raiſe either againſt the wife, or againſt her heirs.

§ 89.

If the huſband lay out on the dotal eſtate expenſes for his own pleaſure, he cannot deduct them, but he ſhall only have a right to carry them away;

1.) Provided he can profit of any thing by carrying it away.

2.) Provided he can carry it away without hurting the dotal fortune.

§ 90.

The huſband acquires thus with reſpect to the neceſſary expenſes,

1.) An action of mandate *, if he have laid them out with the conſent of his wife.

2.) An action for affairs done †, if the expenſes have been laid out without that conſent.

3.) An action, called a demand of what is not due ‡, when he has reſtored the portion entire, without deducting from it the neceſſary expenſes.

4.) An exception of compenſation, when the wife or her heirs have likewiſe any claim againſt him.

5.) An exception of retention ‖. See § 79.

§ 91.

As to uſeful expenſes, the huſband has alſo,

1.) An action of mandate, if the expenſes have been laid out with the wife's conſent, or at leaſt with her knowledge. And,

2.) An action for affairs done, if it can be proved that they were for the advantage of the dotal fortune.

* Actionem mandati. † Negotiorum geſtorum.
‡ Condictio indebiti. ‖ Exceptionem retentionis.

Theſe

These two actions do not take place if the expenses be inconsiderable; if they be no longer useful; if they be excessive, so that the wife cannot pay them without running into debt, or even without selling the dotal fortune: in this case they are reckoned expenses laid out for pleasure. Neither does the right of retention take place with regard to those expenses.

ART. II.

Of the paraphernalia.

§ 92.

WHatever the wife acquires after the completion of the marriage, excepting the portion, by way of succession, of legacy, of donation, *&c.* is comprehended in the effects called *paraphernalia.*

It has likewise been observed above, that whatever the wife has not specially intended to give in name of portion, is reckoned *paraphernalia*, even though she had granted to her husband the enjoyment and administration of all her effects. See above, tit. IV. art. I. § 20.

§ 93.

The property of the *paraphernalia* belongs so fully to the wife, that she can dispose of them at her pleasure, both by deeds to take place in her lifetime, and by settlements in her last will.

The husband has only the administration and enjoyment of them, so he cannot squander them, far less can he alienate them, without the wife's consent.

It is even requisite that this consent be given in express terms, and in writing, or that the alienation be afterward ratified in writing: for we declare, that a consent given by words, and far less presumptions that

the wife has conſented to the alienation, ſhall not be ſufficient.

§ 94.

Paraphernal differ from dotal effects thus:

1.) In that the huſband has the civil property of the laſt, and has only the adminiſtration and uſufruct of the firſt.

2.) In that he can alienate the dotal effects, when they conſiſt in moveables; which does not take place with reſpect to paraphernal effects.

3.) In that the wife acquires, with reſpect to the dotal effects, a tacit hypothec or mortgage from the day of completion of the marriage; and that, with reſpect to the paraphernal effects, this hypothec begins only from the day that they are delivered to the huſband.

If then the paraphernal effects were only delivered to the huſband ſucceſſively, the hypothec would take place for each delivery only from the day it was made; and if in the interval the huſband alienate any of her ſubjects, the wife could have no claim of hypothec on that ſubject.

§ 95.

The wife ſhall have the charge of proving what ſhe brought to her huſband in *paraphernalia*; and in a competition this proof can be made neither by the huſband's acquittances, nor by the wife's ſupplementary oath, but ſolely by the verbal proceſs, or protocol of the judge; by which it appears that the *paraphernalia* have been judicially delivered to the hu and.

§ 96.

When the marriage is diſſolved,

1.) A wife may, to obtain her *paraphernalia*, intent a claim or demand, by virtue of a right of property.

2.) If they conſiſt in things which are waſted by uſe, or the fortune ſettled for a portion have been eſtimated

at

at a certain value, as a ſale-price *, the wife has the action called *præſcriptis verbis*.

3.) She has alſo an action of hypothec againſt any poſſeſſor;

4.) As well as a right of retention.

§ 97.

If a competition ariſe concerning the huſband's effects,

1.) The wife may claim the paraphernal fortune, if it ſtill exiſt among the huſband's effects.

2.) If the paraphernal money have been employed in the acquiſition of an immoveable ſubject, and, *N. B.* if it have been marked in the regiſter or record of hypothecs, that the immoveable ſubject was indeed purchaſed with that money, it is become paraphernal, and conſequently the wife being the proprietor of it, ſhall be ranked in the firſt claſs.

3.) When the paraphernal fortune no longer exiſts, or when it has not been inſerted into the regiſter of hypothecs, that the ſubject bought with the paraphernal money was indeed purchaſed with that money, the wife ſhall have only a tacit hypothec and perſonal right on her huſband's effects, and can conſequently be ranked only in the fourth claſs.

§ 98.

Theſe privileges belong likewiſe to the wife's heirs in a deſcending line, and cannot be given to any other who is not in that line.

* Si dos æſtimato data eſt venditionis gratiâ.

ART. III.

Of the wife's effects called Receptitia.

§ 99.

Wives have often, beſides dotal and paraphernal effects, others, which are called *receptitia.* They are ſuch as a wife reſerves to herſelf before marriage, in order to have the property and enjoyment of them.

§ 100.

The wife conſequently preſerves the property, the adminiſtration, and the enjoyment of this ſort of effects. If ſhe grant her huſband the adminiſtration or enjoyment of them, ſhe gets in them only a tacit hypothec, without perſonal privilege.

§ 101.

The wife is bound to bring a proof of what ſhe pretends to have brought her huſband in effects called *receptitia*; and this proof cannot be made but by judicial deeds.

§ 102.

When the marriage is diſſolved, the wife acquires in theſe effects,

1.) A claim of right, if the effects be ſtill exiſting in kind;

2.) A perſonal action againſt the huſband, and his heirs, if they have been ſquandered;

3.) An action of hypothec againſt any poſſeſſor; and

4.) A right of retention.

§ 103.

In a competition, ſuppoſing theſe effects ſtill exiſt in kind,

1.) The

1.) The wife may claim them as a thing in which ſhe has a right of property.

2.) If they no longer exiſt, ſhe ſhall be ranked among thoſe who have a tacit hypothec.

It would be otherwiſe, if that money had been employed in purchaſing an immoveable ſubject, and if it had been marked in the record of hypothecs, that that was really done.

§ 104.

All the profit which does not ariſe from that money, but from the ſavings and induſtry of the wife, belongs entirely to the huſband, as well as all that, during the marriage, is bought for the family-uſe; unleſs the wife prove for every article, that it was purchaſed with the paraphernal money, or with that called *receptitia*.

ART. IV.

Of the donation on account of the nuptials.

(*De donatione propter nuptias.*)

§ 105.

HUſbands who get portions by their wives, uſe to make in their favour donations on account of the nuptials.

§ 106.

A donation on account of the nuptials is an agreement, by which the huſband, or ſome other in his name, makes a preſent to the wife, in conſideration of the portion, and for her ſecurity. This preſent is called in Germany *Gegenvermæchtniſs* or *Wiederlage*.

§ 107.

The donation on account of the nuptials may be made

made by word or by writing, judicially or extra-judicially, and even by way of delivery.

§ 108.

And as a portion may be ſettled before or after marriage, ſo a donation on account of the nuptials may be made before, or after the nuptials.

§ 109.

But it is requiſite that it be expreſsly mentioned, that the donation is made on account of the nuptials, in conſideration of the portion; otherwiſe it would be regarded as a ſimple donation, which ſpouſes are prohibited to make between themſelves.

§ 110.

If by the contract of marriage, or when the portion is agreed upon, no agreement be made at the ſame time concerning a donation on account of the nuptials, the huſband ſhall not be obliged afterward to make ſuch a donation, by reaſon the portion may very well ſubſiſt without a donation on account of the nuptials.

§ 111.

The donation on account of the nuptials is made,

I. By the huſband himſelf, or by ſome other in his name. See § 106.

§ 112.

II. By the father, who is bound, if the ſon have no fortune, to make the donation on account of the nuptials out of his own fortune; and he may even be obliged to do ſo by the judge, who ſhall regulate the ſum, and, in virtue of his office, ſecure it on the paternal effects.

If the father ſimply make a donation on account of the nuptials, without mentioning that he makes it out of the ſon's money, he ſhall be bound to pay it

out

out of his own money, even though he ſhould have the ſon's fortune in his hands, and ſhould have the adminiſtration of it.

The father's obligation to make a donation on account of the nuptials for his ſon, ceaſes in all the caſes in which he is diſpenſed from the ſettlement of a portion. See above, tit. IV. art. I. § 26.

What we ordain with reſpect to the father, ſhall alſo take place with reſpect to the paternal grandfather.

As to the mother, ſhe ſhall be bound to execute, in favour of her ſons, a donation on account of the nuptials, in all the caſes in which ſhe is obliged to ſettle a portion to her daughters. See above, tit. IV. art. I. § 34.

§ 113.

III. The donation on account of the nuptials may alſo be promiſed, and made by a ſtranger. But when he ſhall not have done it with an intention of making a gift, and when the father ſhall not be in a condition to prove that ſuch was his intention *, he may intent againſt the father an action for affairs done, which turned to his advantage †, in order to be diſengaged from his promiſe, or to be reimburſed, if he have already paid the ſum agreed in the donation, on account of the nuptials.

§ 114.

If the father, or a ſtranger, promiſe to make to the wife a donation on account of the nuptials, out of their own money, it ſhall be valid, even though the huſband were abſent, and had no knowledge of the agreement.

* Animus donandi.

† Actionem negotiorum geſtorum et de in rem verſo.

§ 115.

The donation on account of the nuptials can only be made in favour of lawful wives; wherefore a concubine, even though ſhe were married with the left hand, cannot claim the donation on account of the nuptials, nor its privileges; but ſhe muſt be ſatisfied with what is promiſed to her by her huſband. See above, tit. III. art. 3. § 60.

§ 116.

When the huſband marries a ſecond time, the donation on account of the nuptials, in favour of the ſecond wife, cannot go higher, than the portion of the child of the firſt marriage, who has the ſmalleſt fortune; and what ſhe receives more, ſhall be divided among the children of the firſt marriage. See above, tit. III. § 10.

§ 117.

It is not neceſſary that what is granted by the donation on account of the nuptials, be equal to the portion, and the thing depends ſolely on the good-will of thoſe who make the donation. Moreover, neither the huſband nor the wife is bound to get it recorded in a court of judicature, even though it ſhould exceed the ſum of five hundred ducats.

But if ſuch a donation be made to defraud creditors, or if the children be thereby wronged of their legitim, there would be ground for the Paulian action *, or for the objection for undutifulneſs †.

§ 118.

The wife acquires, by the donation on account of the nuptials, neither the property nor the adminiſtration of what conſtitutes the object of it ‡; but it

* Actio Pauliana. † Querela inofficioſæ donationis.
‡ Gegenvermæchtniſs, or Wiederlage.

makes

makes a part of the donor's inheritance, who preſerves the property of it; even though he ſhould have delivered it to the wife, and the adminiſtration of it had been granted to her.

§ 119.

Nevertheleſs the wife acquires, by the donation on account of the nuptials, a tacit hypothec on her huſband's other effects, from the day of the marriage; or, if the donation be made only after the nuptials, from the day it was made.

If he happen then to alienate the fortune granted by the donation, on account of the nuptials, it would go to the poſſeſſor, with the burden of this hypothec, unleſs the wife had conſented to the alienation. But, with reſpect to what is requiſite to render her conſent valid, we refer to what is ordained above, tit. IV. art. I. § 65. n. 7. on the ſubject of the alienation of the portion, and which, our will is, ſhall equally take place concerning the alienation of the fortune granted by the donation on account of the nuptials.

When the object of the donation on account of the nuptials conſiſts in moveable effects, the huſband may alienate them, and the wife acquires only a tacit hypothec on her huſband's effects.

§ 120.

One who has made a donation on account of the nuptials, acquires, after the diſſolution of the marriage, all the actions competent to thoſe who have ſettled a portion. See above, tit. IV. art. I. § 79.

§ 121.

What conſtitutes the object of the donation on account of the nuptials, cannot then uſually be redemanded during the marriage. Nevertheleſs this rule admits ſome exceptions, in the caſes following.

1.) If the huſband begin to ſquander what was given by the donation on account of the nuptials; in

which caſe the wife may oblige the huſband to leave her the adminiſtration, both of the portion and of what was given by the donation on account of the nuptials, provided ſhe maintain her huſband and his family.

2.) If the huſband's effects happen to be confiſcated, the wife ſhall get reſtitution of all that is due to her, namely, the dotal and paraphernal effects, and thoſe which are called *receptitia*; and ſhe ſhall have her dowery, the preſent made the day after the nuptials, as alſo what was given her for her ſecurity by the donation on account of the nuptials; and this laſt article ſhall be left her as long as ſhe lives.

§ 122.

In a competition for the huſband's effects, the wife ſhall be ranked, with reſpect to the tacit hypothec mentioned, in the fifth claſs.

Unleſs the donation on account of the nuptials be regiſtered in the record of hypothecs, or mortgages; in which caſe ſhe ſhall be ranked in the third claſs.

§ 123.

The donation on account of the nuptials does not take place,

1.) When the marriage is not completed.

2.) When the huſband dies before the nuptial benediction. See above, tit. III. § 26.

3.) When the marriage is declared null. See above, tit. III. art. I. § 34. at the end.

4.) When the marriage is annulled for a fault committed by the wife. See tit. III. art. I. § 38.

5.) When the wife conſents to the alienation, in the manner preſcribed in tit. IV. art. I. § 65. ſhe loſes the hypothec on the ſubject alienated, but ſhe retains her right of hypothec upon her huſband's other effects.

§ 124.

This donation on account of the nuptials differs entirely from the donation at the eſpouſals, or wedding-preſents. By a donation at the eſpouſals is underſtood, thoſe preſents which the bridegroom and bride make to each other when they are betrothed, and exchange rings, or thoſe mutual gifts which they make to each other in money, or value, after the eſpouſals, in teſtimony of a reciprocal affection.

The difference conſiſts,

1.) In this, that the donation on account of the nuptials may be made after the completion of the marriage, whereas the donation at the eſpouſals can only be made before the marriage.

2.) The firſt is made for the ſecurity of the portion, and the other to give a token of one's affection.

3.) The huſband preſerves his right of property, in what is given by the donation on account of the nuptials, this ſubject being engaged to the wife only, to ſerve as a ſecurity for her portion; whereas, by the donation at the eſpouſals, the wife acquires the property of what is given, in ſuch manner that ſhe may even ſettle it to herſelf for a portion.

If the bride lend her bridegroom money to enable him to defray the charges of the wedding, pay his debts, continue his commerce, *&c.* without taking an obligation, ſhe ſhall be ranked in the ſixth claſs, when there is a competition of creditors: but if ſhe took an obligation, ſhe ſhall only be ranked among the creditors by note or hand-writing.

Moreover, if ſhe give her fortune for the acquiſition of a ſubject, if that ſubject be in effect bought, and if the bridegroom cauſe it to be recorded in the regiſter of hypothecs, or mortgages, that the ſubject was purchaſed with the bride's money, ſhe ſhall be ranked in the firſt claſs.

ART.

ART. V.

Of the dowery.

(*De dotalitio.*)

§ 125.

IT is an ancient cuſtom, chiefly in uſe among the nobility and gentry, to ſettle a dowery in favour of widows, to come in place of a portion, and of what is given by the donation on account of the nuptials, which they might exact, except this were done after the diſſolution of the marriage.

§ 126.

This dowery conſiſts uſually in the double of the intereſt of the portion, namely, ten *per cent.* which is paid off the portion, and off what is given by the donation on account of the nuptials, during all the widow's lifetime, provided ſhe continue in widowhood: on the other ſide, the huſband and his heirs retain the property of the portion, and of what is given by the donation on account of the nuptials.

The dowery may, by agreement, be greater or leſs: but if it be made to exceed ten *per cent.* and if the creditors ſhould ſuffer prejudice by it, or the children ſhould thereby be wronged of their legitim, the dowery ſhall be reduced to double the intereſt.

If a dowery be agreed upon in a general manner, and the huſband in his lifetime do not determine the ſum, it ſhall always amount to the double of the intereſt.

§ 127.

The dowery may be ſettled, either before or after the nuptials, either by a covenant, or even by delivery.

§ 128.

§ 128.

All ſuch as may ſettle a portion, may likewiſe agree on a dowery, *&c.*; conſequently not only the huſband, or his father, but even ſtrangers, may enter into articles on this head. See above, tit. IV. art. I. § 23. and following.

§ 129.

But the dowery ſuppoſes,

1.) That there is a ſettlement of a portion, and that it was really paid to the huſband. As to the proof that it was really paid, that has been treated in the Fred. Code, p. 299. § 78. So if there were no ſettlement of a portion, the wife can exact no dowery, even though ſhe ſhould offer to the heirs the portion with intereſt.

If no portion were promiſed to the huſband, and if, notwithſtanding, he ſhould agree on a dowery in favour of his wife, it ſhall be valid, by virtue of the agreement; but it ſhall not have the privilege of a dowery.

§ 130.

That the dowery may ſubſiſt, it is requiſite,

2.) That the marriage be completed by the nuptial benediction. If then the bridegroom happen to die before the nuptial benediction, the bride can only redemand her portion, even though there might have been carnal correſpondence. See tit. III. § 26.

§ 131.

The dowery may conſiſt in moveables or immoveables; in things corporeal or incorporeal; and even in fiefs, without any neceſſity of requiring the conſent either of the direct ſuperior or of the agnats: nevertheleſs, either of them ſhall have liberty, in time of the vacancy of a fief, to reduce the dowery, by returning to the widow, to belong to her in full property, the portion which ſhe brought to her huſband,

as

as well as what was given him by the donation on account of the nuptials.

But the conſent both of the direct ſuperior, and of the agnats is neceſſary,

1.) If no portion has been promiſed, or if it has not been paid to the huſband;

2.) And when a vaſſal gives to a ſtranger, and not to his own daughter, a portion or a dowery.

§ 132.

It is not allowable to ſecure the dowery upon feoffments in truſt; and indeed the heirs-feoffees in truſt ſhall not be bound to pay it to the widow, unleſs they were at the ſame time the heirs of the perſon who granted the dowery.

§ 133.

If the dowery conſiſt in an immoveable ſubject, the widow does not acquire the property of it, but only the uſufruct; and whatever be the rule with reſpect to the uſufruct, the ſame is to be obſerved with reſpect to the dowery, excepting the ſecurity, which is not required of the widow. So the widow enjoys all the fruits which belonged by right to an uſufructuary, ſuch as the right of paſturage, the right of fattening hogs *, wood for her family, (but not for ſale), the right called fines on entries, *&c.*; but ſhe cannot claim fiſhings, huntings, juriſdictions, rights of patronage and toll, treaſures which might have been dug up, and other royalties, and eſpecially mines and minerals; unleſs it have been expreſsly declared that theſe articles ſhould be comprehended in the dowery, or unleſs the general clauſe, with all the royalties which hold of it, were inſerted in the contract.

§ 134.

1.) The widow acquires by this dowery a tacit hy-

* Maſtung.

pothec,

pothec, to which is joined a perſonal privilege; wherefore, if there be a competition of creditors, ſhe ſhall be ranked in the fourth claſs; unleſs ſhe has cauſed the dowery to be regiſtered in the record of hypothecs or mortgages, in which caſe ſhe ſhall be ranked in the third claſs.

2.) If the wife become ſurety for her huſband, the ſecurity can conſiſt neither in the portion nor in the dowery; and indeed the ſecurity which ſhall conſiſt in theſe things, ſhall be null in law, without the neceſſity of pleading the exception of the Velleian decree.

3.) The widow, to obtain her dowery, has right to all the actions which ſhe may plead in favour of her portion. See tit. IV. art. I. § 79.

4.) The widow has liberty to accept the dowery, or to make choice of the portion, and of what is granted by the donation on account of the nuptials. This ſhall take place even though the dowery were regulated with her own conſent.

But when ſhe ſhall once have choſen, ſhe cannot afterward retract. If ſhe happen to die before having made the choice, her heirs can demand only the portion with intereſt after her death.

5.) The heirs of the granter of the dowery can make no alteration in what has been agreed on that head; and if there were nothing ſettled, they cannot, inſtead of reſtoring her portion, and what has been granted by the nuptial donation, pretend to ſettle a dowery, and oblige the widow to be ſatisfied with it.

6.) When the laws grant to the widow the portion called *ſtatutaria*, or when the huſband has given her any thing by his will, ſhe is at liberty to avail herſelf of thoſe benefactions, and to renounce either the dowery, or the portion, and what is granted by the donation on account of the nuptials.

§ 135.

The dowery ceaſes and comes to an end,

1.) By the death of the widow:

2.) If ſhe marry again, and if, by the contract of marriage, there be nothing agreed on that head which may intitle her to keep the dowery:

3.) If ſhe give occaſion for a divorce:

4.) If ſhe be condemned for a crime, even though ſhe ſhould obtain letters of pardon:

5.) If ſhe have ruined the fortune, or even have alienated it, and yielded it to a third perſon:

6.) If the dowery ſhould periſh by mere chance, as by an earthquake:

7.) If ſhe chuſe the portion, and what was granted her by the donation on account of the nuptials, or the portion called *ſtatutaria*, or what was left her in legacy by will. See the preceding ſection.

8.) If ſhe have ſuffered thirty years to elapſe without aſking the dowery,

9.) Or if ſhe have not aſked it during her life.

10.) A widow does not loſe her dowery becauſe ſhe has entered into a convent. But,

11.) When ſhe leads a licentious life, and has even allowed herſelf to be debauched, ſhe loſes her dowery; in which caſe, however, her portion is to be reſtored to her.

§ 136.

The widow ſhall be put in poſſeſſion of her dowery, conſiſting in an immoveable ſubject, with all the fruits which were annexed to it at her huſband's death, within the ſpace of four weeks, to be reckoned from his deceaſe. As to the civil fruits, they ſhall be divided proportionally between the widow and the heirs of the granter.

When the dowery ſhall come to an end, the ſame method ſhall be uſed with regard to the fruits of the laſt year, and the expenſes laid out by the widow, as with

with reſpect to the portion. See above, § 77. 78. and following.

§ 137.

The dowery differs from the donation on account of the nuptials,

1.) In this, that the latter is made for the ſecurity of the portion, whereas the dowery cauſes the portion to ceaſe, and abſorbs it.

2.) In this, that the heirs of the huſband, when the portion has been really paid to him, are obliged to ſettle a donation on account of the nuptials, but not a dowery.

3.) In this, that the widow has, with reſpect to what was given by the donation on account of the nuptials, only a tacit hypothec; and that ſhe has on the dowery, beſides the hypothec, a perſonal privilege.

ART. VI.

Of the preſent made the day after the nuptials, called Morgengabe.

§ 138.

BY *Morgengabe* we underſtand the preſent which the huſband makes to his wife the day after the nuptials for her pocket-expenſes *, which may conſiſt in money or in value. This preſent may be made to the wife by her huſband, even though he ſhould marry a widow: but the wife never makes ſuch a preſent to the huſband, even though he ſhould be married for the firſt time.

§ 139.

This preſent may be promiſed by an expreſs agree-

* Spielgeld.

ment, or it may be made by real delivery. Both may be made after the nuptials.

But if by the contract of marriage this preſent ſhould not be agreed upon, the huſband ſhall not be bound to make it after the nuptials.

§ 140.

Thoſe who can ſettle the *Morgengabe* are,

1.) The huſband, who may give it out of his own proper fortune;

2.) The father, who is obliged to give ſureties with regard to this preſent, in the ſame way that he is bound to give them with reſpect to the portion;

3.) And a ſtranger, by which we underſtand alſo the mother and brothers.

§ 141.

When the *Morgengabe* has been delivered to the wife, ſhe obtains the property of it, and can diſpoſe of it at her pleaſure.

If it be agreed that the intereſt of it ſhall be paid, neither ſhe nor her heirs can demand the property till after the diſſolution of the marriage.

§ 142.

The wife acquires, with regard to the *Morgengabe*, a tacit hypothec upon her huſband's effects, from the day that it was agreed upon and ſettled.

But the wife has no perſonal privilege on this head; wherefore alſo ſhe ſhall be ranked, if there happen a competition of creditors, only in the fifth claſs: but if the *Morgengabe* exiſt in kind, ſhe ſhall be ranked in the firſt claſs: if it no longer exiſt, and if it have been regiſtered in the record of *Morgengabe*, the wife ſhall be ranked in the third claſs.

The wife may uſe the *Morgengabe* as a ſecurity for her huſband, which ſhall not deprive her of the benefit of the Velleian decree.

§ 143.

§ 143.

The *Morgengabe* never returns to the huſband, nor to his heirs, even though the marriage ſhould be declared null, or ſhould be diſſolved by the wife's fault.

ART. VII.

Of the ſucceſſion of the married perſons, in ſo far as it is regulated by the marriage-articles.

§ 144.

THough it be enacted by the Roman laws, that promiſes concerning a future ſucceſſion, as well as ſettlements with reſpect to the ſucceſſion of living perſons, ſhall be invalid, we have however already ordained above, tit. IV. § 8. that when, for the future, married perſons ſhall mutually agree concerning their ſucceſſions, and ſhall ſettle them in the marriage-articles, ſuch kind of deeds ſhall be valid *vi pacti*, by virtue of the agreement; but that they can never be regarded as ſettlements by will, even though the words *laſt will* ſhould be uſed in them.

§ 145.

We have in conſequence further decreed, that after the contract of marriage has been ſigned by the parties concerned, and they have acknowledged that it contains their intentions, whatever is ſettled with reſpect to their ſucceſſions, ſhall have its plenary and full effect, and be valid; without even the neceſſity of admitting two witneſſes, who ſhall not be of uſe, but in caſe that, either of the parties happening to deny their ſubſcription, one were obliged to bring a proof of it.

Whence it follows, that none of the two parties can retract from what has been agreed by the contract of marriage, nor revoke by will what has there been ſtipulated with reſpect to their ſucceſſion.

ART.

ART. VIII.

Of the portion called Statutaria.

§ 146.

IT is uſual in ſeveral of our provinces, by virtue of particular ſtatutes, that the ſurviving ſpouſe ſucceeds to the half of the effects common to both ſpouſes: that is to ſay, a maſs is made of the effects, both of the ſurviving and deceaſed ſpouſe, of which the half belongs to the ſurvivor. It is this half which is called *portio ſtatutaria*.

§ 147.

But this portion only takes place when there is neither contract of marriage nor dotal covenants; for, if there be any, the ſurviving ſpouſe is bound to be ſatisfied with what has been ſtipulated, and is not at liberty to chuſe the portion mentioned, in place of what has been ſettled by the contract of marriage; unleſs the choice were expreſsly reſerved in the marriage-articles.

§ 148.

Moreover nobles, as well as commoners, may exact this portion.

§ 149.

But in order to have a right to exact this portion,

1.) There muſt be a real and lawful marriage; ſo that ſuch as have contracted a prohibited, or a left-hand marriage, cannot claim this portion;

2.) The marriage muſt be completed by the nuptial benediction; ſo that as ſoon as the marriage is celebrated, the wife has a right to this portion, even though the huſband ſhould die before conſummating the marriage.

3.) As

3.) As to eſpouſed perſons, they cannot exact it, if one of them die before the nuptial benediction; which is to be obſerved, even though carnal converſation had intervened.

§ 150.

According to the ſtatutes, the ſurviving ſpouſe ſucceeds then to the half of the effects of both ſpouſes, moveable or immoveable. This ſpouſe would have this half, though nothing were brought in marriage by ſuch ſpouſe, or though ſuch ſpouſe ſhould have no fortune.

§ 151.

As the whole effects of the ſurvivor are to be brought to the maſs, under the wife's effects are comprehended her paraphernalia, what are called *receptitia*, the nuptial preſent, or *Morgengabe*, &c.; as alſo cloaths, jewels, linen, her ſavings, &c.; but not the year of grace.

The huſband brings to it his fortune, and even his wages, as far as they are due at the wife's death; but not the maſculine fiefs, nor the family-feoffments in truſt.

To form the portion regulated by the ſtatutes, all the debts due to the ſpouſes muſt be comprehended in it, and the actions ariſing from them; even though the debts ſhould only be contracted conditionally, and the condition ſhould not exiſt till after the death of one of the parties.

It is the ſame with reſpect to debts due to them out of the country, which are annexed to the perſon, and are conſequently to be ſettled according to the laws of the place where the ſpouſe died. But it is not the ſame with reſpect to ſubjects ſituated out of the province, with regard to which the ſtatutes of the places where they are ſituated muſt be followed.

All ſucceſſions which have fallen to the ſurvivor make

make a part of the maſs, even though they ſhould not yet be divided. Neither is it allowable to renounce them fraudulently, and to the prejudice of the portion regulated by the ſtatutes. - See § 154.

§ 152.

It is a thing paſt contradiction, that to clear the maſs of the common effects, the debts of the ſpouſes are to be deducted from it; under which are comprehended, ſervants wages, and funeral expenſes of the ſpouſe juſt dead, and not of the ſurvivor, even though the ſurvivor ſhould happen to die the ſame day. But debts contracted at play ſhall not be deducted from it, even though they ſhould have been turned into bonds or bills.

§ 153.

The ſurvivor may then demand the half of the maſs of the common effects as his property. The other half falls to the children and heirs of the defunct, or, failing them, to the exchequer.

§ 154.

And as it is by virtue of the laws and ſtatutes that this half is due to the ſurvivor, none of the ſpouſes can revoke nor diminiſh it, nor make any ſettlement to the prejudice of it.

1.) So none of the ſpouſes can alienate their fortune.

2.) Nor employ their ready money in the purchaſe of a maſculine fief, or of a family-feoffment in truſt.

3.) Nor grant a family-fief on their ſubjects or eſtate.

4.) Neither can they diminiſh this half by a teſtamentary ſettlement, unleſs the ſurvivor were informed, that by the deceaſed ſpouſe's will it is infringed, and, nevertheleſs, ſhould expreſsly conſent to that ſettlement. That ſettlement ſhall alſo have its effect, when the ſurvivor ſhall once have accepted the will.

5.) Neither can this half be augmented by will; and

if

if there be a legacy made in it to the ſurvivor, ſuch ſurvivor ſhall be bound to be anſwerable for it.

6.) Neither can the ſpouſe predeceaſing, eſtimate their effects, in order to ſerve for a foundation to their diviſion; but the ſurvivor ſhall have a right to require another eſtimate to be put upon them.

7.) Neither is it our will that any of the ſpouſes ſhould have liberty to renounce ſucceſſions falling to them, even though the renunciation ſhould be made in favour of the children.

§ 155.

But we extend this prohibition only to the caſe in which a renunciation is made to defraud this half, and with an intention to deprive the ſurvivor of it, in whole, or in part.

For we do not intend to deprive the ſpouſes of the liberty of diſpoſing of their effects, whether through neceſſity, or for their own advantage, or their pleaſure, or to exerciſe their liberality and gratitude, nor to ſtraiten them ſo that they cannot alienate certain things, eſpecially if they be of little importance; and this ſo much the leſs, that, at the utmoſt, this half can only be exacted out of the fortune exiſting at the time of the ſpouſe's deceaſe.

§ 156.

But to avoid long diſcuſſions for diſcovering whether the alienation, or diſpoſal, has been made to the prejudice of this portion; we enact and ordain, that the ſettlement ſhall not be reckoned as made to the prejudice of this portion, unleſs the perſon to whoſe advantage it was made, ſhall know, or believe, that it was indeed made to the prejudice of this portion, and with an intention to diminiſh it. If there be no other way of bringing this proof, recourſe may be had to the oath of party, for diſcovering of the truth.

§ 157.

If it be proved, that the alienation was made to defraud this portion, the heir ſhall be bound to bring to the maſs of their common effects the things alienated, as if they were ſtill among the defunct's effects. But they have no recourſe againſt thoſe in whoſe favour the defunct has alienated them; for in quality of heirs they are bound to warrant the defunct's deeds.

§ 158.

The ſtatutes, by ſettling this portion, had no view of eſtabliſhing a community of goods. Whence it follows, that the rights ariſing from a community of goods are not applicable to this portion.

§ 159.

Neither is this portion a ſucceſſion properly ſo called, nor a ſucceſſion to all the defunct's rights, but only a profit, a gain, which the ſtatutes grant to the ſurvivor. Wherefore neither the creditors, nor heirs of the defunct, have any action againſt the ſurvivor, in quality of heir by the ſtatutes; but they may only proſecute the other real heirs of the defunct.

§ 160.

The ſurvivor and his heirs are intitled, with regard to this portion, to the action called *condictio ex lege*, againſt the heirs of the defunct ſpouſe, and failing them againſt the exchequer; ſo that they are obliged to deliver the half of all the common effects.

§ 161.

This action uſually cannot be intented till after the diſſolution of the marriage. Here, however, are ſome caſes, in which the portion in queſtion may be exacted even during the marriage.

1.) When the huſband's effects happen to be confiſcated on account of a crime, and that even though it were for the crime of high treaſon.

2.) When one of the ſpouſes demands this portion,

or

or a part of it, for the maintenance of a father or mother who have fallen into poverty.

3.) When one of the ſpouſes ſquanders their fortune, and when it is to be dreaded that there will remain nothing for this portion, in which caſe the other ſpouſe has a right to require ſurety.

§ 162.

It is moreover requiſite, that the ſurvivor make an inventory, within the ſpace of ſix weeks after the death of the defunct ſpouſe, that it be upon oath, that it be preſented to the judge, and that, within fifteen days, a declaration be made before him, whether the ſurvivor intend to be heir to the defunct, and to exact the half regulated by the ſtatutes, or intend to be ſatisfied with their own proper fortune.

If the inventory be not preſented within ſix weeks, or the declaration made within fifteen days, it ſhall be reckoned, by virtue of the law, that the ſurvivor is declared heir according to the ſtatutes *, nevertheleſs only under the benefit of the law, and of the inventory †.

Our will is, that from ſuperabundance of law, the judges, both in towns and villages, ſhould advertiſe the ſpouſes concerned, that they are, within the ſpace of ſix weeks, to make the inventory upon oath, and preſent it to them; and alſo, to declare within fifteen days, whether they intend to have the half regulated by the ſtatutes, or to be confined to their own proper effects. They ſhall, in like manner, adviſe them, that if they neglect either of theſe two things preſcribed, they ſhall be reckoned heirs according to the ſtatutes, under the benefit of the law, and of the inventory; and that a maſs ſhall be made of the effects of both ſpouſes, of which the ſurvivor ſhall have the half after the debts are deducted from it.

* Pro herede ſtatutario. † Sub beneficio legis et inventarii.

The ſpace of ſix weeks, nor that of fifteen days juſt mentioned, cannot be prolonged on any pretext; and our will is, not to reſtore thoſe to their right who ſhall let theſe ſpaces elapſe without conforming themſelves to what has been juſt ordained.

If the ſurvivor die within the ſpace of ſix weeks, or within the fifteen days, without making the declaration, the heir ſhall be at liberty to determine within what ſtill remains of the time for declaring themſelves; but when thoſe ſpaces are elapſed, if they have not made a choice, they ſhall be reckoned heirs according to the ſtatutes *.

When the ſurvivor marries again without ſettling affairs with the children of the firſt marriage, not only the penalties mentioned above, tit. III. § 24. let. i. ſhall be incurred, but ſuch ſurvivor ſhall alſo be deprived of the liberty of chuſing and drawing either their own proper fortune, or the portion regulated by the ſtatutes; our will being, that in ſuch a caſe the election go to the children, who may determine either to give the portion regulated by the ſtatutes, or to allow the ſurvivor to draw their own proper fortune.

§ 163.

In fine, this portion cannot be exacted,

1.) When there are marriage-articles exiſting. See above, § 147.

2.) When the ſurviving ſpouſe has renounced the portion regulated by the ſtatutes.

3.) Alſo when the ſurvivor has made an election, and aſked to draw their own proper fortune. See the preceding ſection.

4.) When it is by the fault of the ſurviving ſpouſe that the marriage is diſſolved. See above, tit. III. art. I. § 38.

* Heredes ſtatutarii.

5.) When

5.) When a huſband happens to kill his wife whom he finds in the fact. See above, § 76.

6.) When the ſurvivor does not proſecute for the murder committed on the perſon of the deceaſed ſpouſe.

7.) When a wife marries again within nine months, reckoning from the diſſolution of the marriage, and that even though we ſhould have granted a diſpenſation for it. See above, tit. III. § 7.

8.) When after the diſſolution of a marriage a widow is irregular in her conduct, and ſuffers herſelf to be debauched, the huſband's heirs may redemand the portion regulated by the ſtatutes.

9.) In fine, this portion does not take place when the ſurvivor marries again without having ſettled affairs with the children of the firſt marriage. See above, tit. III. § 24. let. i. and the preceding at the end.

TITLE V.

Of the obligation of a father to acknowledge his children for his own.

(De agnoſcendis liberis.)

§ 1.

IT muſt here be laid down as a general rule, That a man is to be ſatisfied with moral certainty in all caſes where the nature of the things themſelves does not allow of proceeding farther, nor of acquiring a perfect and abſolute certainty.

From this principle it neceſſarily follows, that when a child is born in lawful wedlock, and comes to the full time, that is, in the ninth or tenth month after the nuptial benediction, the father is to be obliged to acknowledge

acknowledge it for his own, and to receive it as ſuch.

§ 2.

a) This ſhall take place even though the wife ſhould have tranſgreſſed with others before marriage, and though ſhe had born children to them, without the huſband's having any knowledge of either. For although he had thereby ſufficient grounds for annulling the marriage, that does not hinder him from being obliged to acknowledge as his own the child born during the marriage and to the full time.

b) The father ſhall be bound to acknowledge this child for his own, even though the mother, before or after delivery, or in her laſt moments, ſhould declare it conceived in adultery; provided always that the huſband have certainly performed to her the conjugal duty. It would however be otherwiſe, if the declaration were accompanied with circumſtances confirming its own truth; as if it were proved that ſhe had intrigues with the man whom ſhe declares father of the child; if it were found that they had written love-letters to each other, *&c.*

§ 3.

To oblige a father to acknowledge a child as his own, it is requiſite,

1.) That it be born in lawful wedlock: for then the preſumption is, that he is its father; and it would not be natural, that after being joined to a perſon by the bond of matrimony, to live always together and procreate children, and after having performed to her the conjugal duty, he might diſown the children of which ſhe is afterward delivered.

2.) It is requiſite that the children be born within the time preſcribed by nature for deliveries. Now, according to the ordinary courſe of nature, children are born in the ninth or tenth month after the nuptials,

tials, or after the father's death. When a child is come to the time, the father cannot be excuſed from acknowledging it as his own.

§ 4.

But as this moral certainty is only founded on preſumptions, it neceſſarily follows, that if the huſband have ſtronger preſumptions to the contrary, and well-grounded ſuſpicions that he is not the father of the child, the matter is to be more particularly examined.

§ 5.

If then a child be born in the ſixth, ſeventh, or eighth month after marriage, it ſhall be examined whether any thing be wanting to its perfection; an examination which ſhall be made by calling experienced midwives, phyſicians, and ſurgeons. Informations ſhall alſo be taken of ſome other circumſtances; for example, if the woman have had ſuſpicious intercourſe with other men, *&c.*

If ſuch a premature child have all the perfection of a child born in the ninth or tenth month, or if the huſband have not performed the conjugal duty to his wife in the beginning of the marriage, he ſhall not be bound to acknowledge that child as his own.

§ 6.

The ſame ſhall be the caſe when a woman ſhall indeed be delivered in the ninth or tenth month after the diſſolution of the marriage, or after her huſband's death; but when the relations ſhall offer to prove, that the huſband had not performed to her the conjugal duty even ſome months before the time requiſite for his poſſibly being the father of the child, or when he was then abſent, or incapable of getting the woman with child; in which caſe theſe circumſtances are to be examined.

If a woman, contrary to the ordinary courſe of nature,

ture, ſhould be delivered in the eleventh month after the diſſolution of her marriage, or the death of her huſband, the child ſhall not immediately be reckoned illegitimate, but it ſhall firſt be examined whether all its members be more vigorous than thoſe who are born according to the uſual courſe of nature; whether the woman, after the diſſolution of her marriage, or after her huſband's death, have had a ſuſpicious intercourſe with other men; and whether the huſband, in the laſt days preceding the diſſolution of the marriage, or his own death, could perform conjugal duty to his wife, and did in effect perform it.

If it ſhould appear that ſuch a late child had not its members more vigorous than other children born according to the uſual courſe of nature; or if it were proved, that the woman, after the diſſolution of her marriage, or after her huſband's death, had a ſuſpicious intercourſe with other men; or that before the diſſolution of her marriage, or before her huſband's death, he could not perform to her the conjugal duty, on account of abſence, of ſickneſs, *&c.* neither the huſband after the diſſolution of the marriage, nor his heirs nor agnats after his death, ſhall be bound to acknowledge that child as lawful.

It is a ſtrong preſumption in ſuch a caſe againſt a child who has not been born according to the uſual courſe of nature, when the father has a conſiderable fortune, and there is reaſon to ſuſpect that the wife, in order to keep the fortune, may have impoſed a child upon him.

§ 7.

It may likewiſe happen, while a marriage ſubſiſts, that a father may have reaſon to doubt whether he ought to acknowledge as his own a child whom his wife brings forth: for if, after the nuptial benediction, the huſband do not conſummate the marriage, either becauſe ſome ſickneſs has happened to him, or

he

he has had ſome journey to make, or if, on account of ſome ſuſpicions, he have abſtained for ſome months from touching his wife, and if his wife, nevertheleſs, be delivered in the ninth or tenth month, it ſhall be neceſſary, in caſe he will not acknowledge the child, to examine theſe circumſtances, as is preſcribed in the preceding article; which ſhall alſo be obſerved, if the huſband have been abſent or ſick for ten full months, and if the wife be delivered after the ten months.

§ 8.

If the wife be convicted of adultery, the huſband ſhall not be bound to acknowledge the child whom ſhe brings forth, even though he ſhould have performed to her the conjugal duty within that ſpace.

§ 9.

If a difference ariſe concerning this acknowledgment, the huſband and his heirs, as alſo his agnats, ſhall be bound, in all the caſes mentioned, to maintain the wife and child during the continuance of the proceſs, and to advance the coſts of ſuit, without having a right to demand ſecurity.

§ 10.

If a widow who is with child marry again within the year of mourning, or have otherwiſe an unlawful intercourſe, the child who ſhall be born in the ninth or tenth month after her huſband's death, ſhall be reckoned to belong to him, unleſs there be circumſtances to render the thing extremely ſuſpicious. As to the widow, ſhe ſhall loſe the portion, and all her nuptial gains, which ſhall fall to the children of the firſt marriage; and the woman ſhall moreover be ſhut up for ſome years in a houſe of correction.

TITLE VI.

Of the obligation of parents aſcending to maintain and ſupport their children, and of the reciprocal duty of children to ſupport their parents.

§ 1.

AMong the privileges which nature gives children from their fathers and mothers, this is, without doubt, one of the chief, namely, that fathers and mothers are obliged to maintain their children, and take care of them till they have arrived at the age of maturity: ſee book I. tit. IX. art. III. § 36. a ſentiment which nature has impreſſed not only on man, but even on the brute beaſts.

§ 2.

The father, as head of his own family, is chiefly obliged to perform this duty; ſo that if the mother could not ſuckle her own children, he would be bound to pay a nurſe.

§ 3.

When the father is poor, and not in condition to maintain his own children, or when he is dead, and the children have no fortune, the mother cannot be excuſed from providing their maintenance. See book I. tit. IX. art. I. § 72.

§ 4.

If there be neither father nor mother, or if they be not able to maintain their children, the obligation to do it falls upon the paternal grandfather, and after him upon the grandmother by the father's ſide; they failing, it is the duty of the grandfather and grandmother by the mother's ſide to take the charge of their maintenance.

5.

§ 5.

But if the children afterward come to gain any fortune, the grandfathers and grandmothers may redemand what they have advanced for them.

§ 6.

The obligation to maintain children, regards not only the new-born, but is extended even to the adults, to the emancipated, and even to thoſe who have received portions, when they fall into indigence.

§ 7.

When a child who is married with the father and mother's conſent, falls into ſuch poverty that he cannot afford maintenance for himſelf, or for his family, the perſons mentioned in the preceding article are obliged to provide, not only for his own neceſſities, but even for thoſe of his family: and if the ſon had received a portion with his wife, the alimony or maintenance muſt be proportioned to the portion. As to children who ſhall marry againſt the will of father and mother, they ſhall be deprived of theſe benefits.

§ 8.

Fathers and mothers are obliged to maintain their children born in adultery, in inceſt, or in fornication. See above, tit. IV. art. I. § 37.

§ 9.

By alimony or maintenance in general, is underſtood every thing neceſſary for the preſervation of the children; namely,

1.) Food.

2.) Cloathing proportioned to the child's condition.

3.) Lodging for the child and his family, with the neceſſary furniture and utenſils of a family, as alſo the ſervants which cannot be wanted, ſuch as a nurſe, &c.

4.) Medicine in ſickneſs.

5.) The expenſe of learning to read, write, and caſt accounts.

6.) Inſtruction in religion.

7.) Charges of interment.

8.) As to literature, the parents mentioned above are not obliged to contribute any thing to it; but they cannot be excuſed from getting their children taught a calling or trade, and from furniſhing the expenſes neceſſary for that purpoſe.

9.) Neither are they obliged to pay the ranſom of their children who have been made priſoners.

§ 10.

When the parents juſt mentioned furniſh maintenance for their children, they have a right to require of them the ſervices ſuitable to their condition, and that in proportion to their maintenance.

§ 11.

The obligation to maintain children ceaſes,

1.) When the childrens fortune is ſufficient for their own maintenance.

2.) When the parents who ought to maintain them are themſelves poor, and ſcarcely have ſubſiſtence.

3.) When they have once portioned their children, and they by their irregularities have ſquandered their fortune.

4.) When the parents have againſt them reaſons ſtrong enough to diſinherit them.

5.) When the children can gain their bread in another way, as if they were fit to be ſoldiers, or if they were of a ſtation to go into ſervice, and they have an opportunity given them to do ſo.

6.) Parents, moreover, are not bound to pay paſt maintenance, nor to diſcharge the debts contracted on that account.

§ 12.

Children are alſo reciprocally obliged to maintain their

their aſcending parents, when they happen to fall into poverty: a duty which they ſhall be bound to pay them, though they may have been abuſed by them, or though the parents may have been bad œconomiſts of their fortune, and may have even ſquandered a part of that of their children, or had been baniſhed their country for a crime: but this obligation ſhall ceaſe if they be outlawed, if they have committed a crime deſerving death, or if they have apoſtatized, that is to ſay, abandoned one of the three religions tolerated in the empire, to embrace Judaiſm, Mahometiſm, *&c.*

§ 13.

There are yet other perſons, for whoſe maintenance equity, as well as our laws, ordain a proviſion. For example:

§ 14.

I. A huſband is obliged to maintain his wife, though ſhe may have brought him no portion, even when a portion was promiſed. He is likewiſe obliged to this, though the wife be conſtrained to leave him on account of his bad uſage of her.

This obligation ſubſiſts, even when there are differences between them with regard to the bad uſage*; when the huſband accuſes the wife of adultery, and a law-ſuit is raiſed on that account.

Obſerve, moreover, that under alimony, or maintenance, are to be comprehended the coſts of ſuit.

But if, by a ſentence, the wife be declared guilty, the huſband ſhall no longer be bound to maintain her, unleſs ſhe give good and ſufficient ſecurity, that if ſhe happen to ſuccumb, or be caſt, in the following points in controverſy, ſhe will reſtore to her huſband both what he may have already advanced, and what he ſhall ſtill further expend.

* Super ſævitia.

§ 15.

§ 15.

II. After the huſband's death, his heirs are obliged to maintain his widow. Nevertheleſs, if ſhe have brought a portion to her huſband, and if a proceſs be raiſed concerning the maintenance, they may deduct the alimony from the incomes of the portion.

In the following title, § 5. and following, ſhall be explained what is to be obſerved, when, after the huſband's death, the wife delares herſelf pregnant.

§ 16.

This obligation, both of the huſband and his heirs, ceaſes,

1.) If the wife have effects of her own ſufficient for her maintenance.

2.) Or if the huſband be himſelf reduced to poverty, and be obliged to gain his bread by the labour of his hands.

3.) If the wife be in a condition to gain her bread in an honeſt way, and ſuitable to her condition.

4.) If ſhe be convicted of having committed adultery, or of having malicioufly abandoned her huſband, or of having given reaſon for a divorce.

5.) If ſhe be condemned on account of a crime diſgraceful, and meriting death.

§ 17.

III. On the other ſide, the wife and her heirs are obliged to maintain the huſband, when he has fallen into poverty, even though he ſhould have ſquandered his wife's portion.

This rule admits exceptions in all caſes ſimilar to thoſe in which the huſband is diſpenſed from maintaining his wife. See § 16.

§ 18.

IV. One is alſo obliged to maintain their brothers and ſiſters, be they brothers and ſiſters german, conſanguinean,

ſanguinean, or uterine, when they happen to fall into indigence; and this, even though the father may have diſinherited one of the brothers, or prohibited to give him maintenance.

As to the brothers and ſiſters of one's father and mother, of one's grandfather and grandmother, as to one's father-in-law and mother-in-law, one is not obliged to afford them maintenance, unleſs he pleaſes to do ſo out of charity, or to ſpare the family the ſhame of ſeeing them deſtitute.

When a brother is engaged in the eccleſiaſtical ſtate, he ſhall be bound to maintain his brother out of the income of his benefice.

This obligation ceaſes not only in all the caſes in which a father is exempted from the obligation of maintaining his own children; ſee above, § 11. but even when the brother or ſiſter ſhall have an irregular behaviour.

But the obligation of maintaining one's brothers and ſiſters concerns only their perſons, and is not extended beyond what is neceſſary for their food and cloathing.

§ 19.

V. Neither ſhall this obligation be extended to other relations, nor to allies, and far leſs to godchildren and their godfathers, to vaſſals and their ſuperiors, who are not bound to furniſh maintenance reciprocally to each other.

The ſame deciſion takes place with reſpect to a patron of a church and his pariſhioners, to a maſter and his ſcholars, to a donor and donee. Nevertheleſs, in this laſt caſe, the donor, who ſhould find himſelf reduced to extreme neceſſity, might revoke the donation on account of ingratitude.

TITLE

TITLE VII.

Of the examination into ſuſpicious pregnancies, which takes place when a woman, after the diſſolution of her marriage, or after her huſband's death, declares that ſhe is pregnant.

(De ventre inſpiciendo cuſtodiendoque partu. Si mulier ventris nomine in poſſeſſione calumniæ cauſa eſſe dicatur.)

§ 1.

IT has been remarked in title V. that doubts may ariſe concerning the obligation both of a huſband and his heirs, to acknowledge the children which his wife may bring into the world. There are eſpecially two caſes, in which the thing may be ſuſpicious.

1.) When a marriage is annulled, and the wife nevertheleſs declares, that ſhe is with child to her huſband.

2.) When a wife makes the ſame declaration after her huſband's death.

In theſe two caſes, the huſband, or his heirs and agnats, are intitled to have ſome certainty in this reſpect, that a child and an heir may not be impoſed upon them.

This is the reaſon that the laws have preſcribed and determined the precautions which the huſband and his heirs and agnats may take to be aſcertained of the truth.

§ 2.

I. When then a woman who is ſeparated from her huſband, declares that ſhe is with child to him,

1.) She, or her father, or her guardian, muſt notify, within the ſpace of thirty days after the divorce, either

either to her huſband, or even to the huſband's father, that ſhe is pregnant. If both were abſent, the notification ſhall be made either by a deed to be delivered at their dwelling-houſe, or by two credible witneſſes, whom ſhe ſhall ſend thither. Moreover, ſhe ſhall be obliged to prove that this notification was made.

2.) If the huſband ſhould deny, or doubt, that the wife is pregnant, he ſhall cauſe it to be declared to her, by a deed, or by two witneſſes, within the ſpace of thirty other days.

3.) And he ſhall, at the ſame time, demand of the judge that three midwives be named, at his pleaſure; and that they be injoined to examine conſcientiouſly, and in the manner that they are obliged to do by their oath, whether the woman in queſtion be really with child. The examination ſhall be made before ſome honeſt women, whom the party ſhall name to be preſent at it; and if there be in the place but one midwife, two others ſhall be brought from the neighbourhood.

4.) If the midwives declare unanimouſly, or by plurality of voices, that the woman is pregnant, and if the woman herſelf make oath, that ſhe believes herſelf to be ſo, the huſband ſhall be bound to regard as his own, the child of which ſhe is pregnant, and to maintain the mother; and in the maintenance ſhall be included the expenſes of childbed.

5.) But he ſhall be allowed to keep, at his own coſt, with his wife, two keepers, or overſeers, who ſhall be inſtructed never to leave her, and to watch over her ſteps, and eſpecially at her delivery.

6.) If, after the delivery, the huſband ſhould want to prove that the child cannot be his, becauſe he was long abſent before the ſeparation, or becauſe he was ſick, and incapable of performing the conjugal

duty; he ſhall be allowed to bring that proof, provided he furniſh the maintenance.

7.) In caſe the midwives think unanimouſly, or by plurality of voices, that the woman is not pregnant, ſhe cannot claim without any condition an alimony to be given her; nevertheleſs, as the tokens of pregnancy are often very uncertain, if ſhe make oath that ſhe is with child, and if, beſides her oath, ſhe produce a ſurety to anſwer for the reimburſement of what ſhall be advanced her for maintenance, it ſhall be afforded her; and if the parties cannot agree amicably on the ſum proper to be determined for her maintenance, it ſhall be regulated by the judge.

But, as has been ſaid, the huſband has a right to appoint her keepers and overſeers, to watch her ſteps, till ſhe be delivered.

§ 3.

If the wife, within the thirty days preſcribed, do not notify her pregnancy, or will not ſuffer herſelf to be viſited, or admit keepers, the huſband ſhall not be bound to acknowledge the child as his, nor to maintain it.

Nevertheleſs, as the wife cannot, by her negligence, do a prejudice to the child, ſhe ſhall be at liberty to notify, even after the thirty days are elapſed, her pregnancy to her huſband, that he may get midwives named to viſit her, and appoint keepers for her; though in the mean time he be not bound either to acknowledge the child as his own, or to maintain it. But if the child come at the uſual time required, the obligation to acknowledge it as his own, and to maintain it, ſhall have a retroſpective effect, till the time of divorce. If the wife never notify her pregnancy to her huſband, he cannot be obliged to furniſh maintenance either to her, or to the child; far leſs can he be bound to acknowledge the child as his own.

It

It follows nevertheleſs, ſeeing the mother cannot, by her negligence, do a prejudice to the child, that he can at any time bring a proof, by a truſtee, that his mother was pregnant, and was delivered at the proper time. If he bring this proof, the ſeparated huſband, unleſs he can bring proof of the contrary, ſhall be obliged to acknowledge him as his own child, and to furniſh him a maintenance, reckoning from the day of his birth.

§ 4.

On the other ſide, if the huſband, within the ſpace of thirty days, reckoning from the notification made to him of the pregnancy, do not, in like manner, declare, by a deed, or by two unexceptionable witneſſes, that he does not believe his wife pregnant; or if, after having made this declaration, he do not demand midwives to make the viſitation; or if, after they have made it, and have certified the pregnancy, the huſband do not appoint keepers, he ſhall be bound to acknowledge the child, who may be born nine or ten months after the ſeparation, and to maintain it till he has proved that he is not its father.

§ 5.

II. In the ſecond caſe, when a woman, after her huſband's death, declares herſelf with child, ſhe ſhall, in like manner, be bound to notify her pregnancy to her huſband's heirs, within the ſpace of thirty days after his deceaſe.

a) And the heirs have likewiſe a right to demand midwives to examine the pregnancy.

b) If the midwives declare unanimouſly, or by plurality of voices, that the wife is with child, ſhe ſhall be put, in name of the child of whom ſhe is pregnant, in poſſeſſion of the huſband's effects; and, for this purpoſe, ſhall be named a curator, or truſtee, who, in preſence of the heirs, ſhall take an inventory of

the father's effects. He ſhall alſo have the charge of adminiſtering them, and of furniſhing maintenance to the mother, till ſhe be delivered; but he can alienate nothing.

c) The heirs ſhall alſo have right to pay overſeers, who ſhall continue with the wife till her delivery, and be preſent at the birth of the child.

d) If the wife be delivered at the proper time, the heir ſhall ſtill have a right to prove that the child does not belong to the defunct, ſuppoſing they have ſufficient tokens to ſhow that he is not the father of the child.

e) If, by plurality of voices, the midwives pretend that the wife is not pregnant, ſhe cannot require to be put in poſſeſſion of her huſband's effects; but ſhe ſhall have a right to demand maintenance, on giving not only juratory caution, but good and ſufficient ſecurity, that the advances which ſhe ſhall receive wrongfully ſhall be reſtored.

§ 6.

In both caſes, when overſeers ſhall be named to aſſiſt at the delivery, it ſhall not be in a ſuſpicious place, where there may be, for example, ſeveral outlets, or entries; and if it be in the night-time, there muſt, at leaſt, be three candles kept lighted about the bed.

Each party ſhall have a right to name two honeſt women to aſſiſt at the delivery.

§ 7.

If the wife, or the heirs of the defunct huſband, neglect the precautions preſcribed on this head, what is ordained in § 3. and 4. ſhall in like manner take place.

§ 8.

Wives ſhall eſpecially obſerve theſe precautions when the defunct huſband's fortune is conſiderable; becauſe

becauſe it is in that caſe chiefly that a ſuppoſititious child is moſt to be dreaded.

§ 9.

When the wife ſhall have been put, in name of her child, in poſſeſſion of the father's fortune, it ſhall not be allowable for her, no more than for the wife's father, to make a ceſſion of it to a third perſon, ſuch a ceſſion being null in law.

If, nevertheleſs, the ceſſion had been made, and the heirs had gained the cauſe, they may redemand from any poſſeſſor the ſubjects ceded, with the fruits received; and thoſe who have made the ceſſion, ſhall be obliged to account to the heirs for all damages and intereſt.

§ 10.

If the wife be convicted of having ſubſtituted, or impoſed a child, ſhe ſhall not only loſe her portion and other rights which belong to wives, but our will is, that ſhe be, beſides, ſhut up in a workhouſe for ſix years, and that the perſon who ſhall have favoured, in any other manner, the impoſition, be condemned to labour in a fortreſs for three years.

§ 11.

III. There is ſtill a third caſe which requires like precautions. It is when a wife, out of hatred to her huſband, denies that ſhe is with child, and when the huſband ſeparated from his wife againſt her inclination, would deſire to have an heir on account of the fiefs he poſſeſſes. In this caſe, it ſhall be lawful for the huſband to get her viſited by three midwives, and to put, at his charges, overſeers about her.

If the midwives, by plurality of voices, declare that the wife is not with child, and if the huſband notwithſtanding give oath that he believes her pregnant, he ſhall have liberty to place overſeers about her, till he be certain that ſhe is not ſo.

BOOK III.

TITLE I.

Subject of the third Book.

§ 1.

WE have treated, in the firſt book of this firſt part, of the perſonal ſtate, and of the rights and privileges thence reſulting. We have there alſo obſerved, that this ſtate was of three ſorts, namely, the ſtate of liberty, the ſtate of a citizen, or burgeſs, and the family-ſtate.

§ 2.

After having ſhown that the family-ſtate is acquired by a lawful marriage, we have treated, in the ſecond book, of marriage, and other matters relating to it.

§ 3.

As it is a neceſſary conſequence of the family-ſtate, and of that of a citizen, that all ſuch as are members of a family, or citizens of a city, ought to protect one another mutually, the neceſſity of guardianſhips, which are to make the ſubject of this third book, ariſes naturally from that ſource.

§ 4.

We ſhall treat, in the ſecond title, of guardianſhips in general.

§ 5.

§ 5.

In title III. of the guardianſhip appointed by the father's will.

§ 6.

In title IV. of the guardianſhip of the neareſt relations, or neareſt of kin.

§ 7.

In title V. of the guardianſhip appointed by the magiſtrate, where ſhall be ſhown who is to ſolicit the ſettlement of a guardian.

§ 8.

In title VI. of the management of guardianſhips, comprehending both the education of the pupils and the adminiſtration of their effects; where we ſhall begin with enumerating the conditions which a guardian is to perform, before entering upon the exerciſe of his guardianſhip, and which conſiſt,

a) In getting himſelf confirmed by the judge,

b) In taking an oath of fidelity,

c) In giving ſurety,

d) And in making an inventory of the pupil's effects.

There alſo ſhall be found preſcribed,

1.) How the guardian is to take care of his pupil and his education. Art. I.

2.) What he is to obſerve in the adminiſtration of the pupil's effects. Art. II.

3.) And how one is to proceed in order to receive the accounts of his adminiſtration. Art. III.

§ 9.

In title VII. we ſhall treat of the authority and power which guardians have in affairs relating to their pupils.

§ 10.

In title VIII. ſhall be ſhewn, to what action a pupil has

has right againſt a third party, by the deed of his guardian; and to what action a third party has right againſt a pupil, by the deed of the ſame guardian.

§ 11.

In title IX. we ſhall treat of the actions to which a pupil has right againſt a guardian, and of thoſe which a guardian has againſt his pupil; a ſubject which will comprehend ſeven articles, in which ſhall be treated,

I. Of the direct action of guardianſhip, which the pupil has againſt his guardian, chiefly in order to make him give an account of his adminiſtration.

II. Of the indirect action of guardianſhip, which the guardian has againſt his pupil, to procure payment of the advances made, and the damages ſuſtained by him.

III. Of theſe ſame actions, in ſo far as they take place againſt a pupil, and one who, without being named guardian, has nevertheleſs performed the functions of one, and adminiſtered the pupil's affairs *bona fide*, who is called a *vice-guardian*.

IV. Of the engagements of a guardian, who falſely and fraudulently paſſed himſelf as ſuch.

V. Of the heirs of guardians, where it ſhall be declared how far theſe heirs may be ſued with regard to the guardian's deeds.

VI. Of the ſureties who have become bound for guardians, and of their engagements.

VII. Of the caſes in which a magiſtrate may be ſued ſubſidiarily.

§ 12.

In title X. ſhall be enumerated the means by which guardianſhips will come to an end.

§ 13.

In title XI. we ſhall treat particularly of the lawful excuſes which exempt one from accepting a guardianſhip.

§ 14.

§ 14.

In title XII. ſhall be declared when a guardian may be accuſed and ſet aſide as ſuſpected.

§ 15.

And, in fine, in title XIII. we ſhall treat of the curators who are given to minors, and to other perſons who are not themſelves in a condition of managing their own affairs.

TITLE II.

Of guardianſhips in general.

§ 1.

AMong the privileges flowing from the family-ſtate, and from that of a citizen, is alſo comprehended guardianſhip: for a father being obliged to take care of the preſervation of his children, the laws have allowed him a liberty to name, in his will, a guardian for his children in minority; and this guardianſhip is called *teſtamentary*.

§ 2.

But if the father die without making ſuch a ſettlement, it belongs to the neareſt relation, by virtue of the family-right *, to protect the members of the family, who cannot, on account of the imbecillity of their age, themſelves provide for their own preſervation; and this guardianſhip is called *legal*.

§ 3.

When there are no relations, it is the duty of the magiſtrate to take care of pupils: for what has engaged men to ſubmit to a republic, is the hope that

* Jure familiæ.

they ſhall be protected by it, and the perſuaſion that the guidance and defence of all ſuch as cannot conduct or defend themſelves, ſhall be committed to the care and vigilance of a guardian, whom the magiſtrate is to name; this guardianſhip is called *dative.*

§ 4.

Guardianſhip is then the power of protecting ſuch as, by the weakneſs of their age, are not in a condition to defend themſelves.

§ 5.

Guardianſhip is either appointed by will, or committed to the neareſt relations, or ſettled by the magiſtrate.

When guardianſhip is not accompanied by adminiſtration, the guardian is called *honorary.* We ſhall treat below of his duty, tit. VI. § 6. art. II. § 26. 35.

§ 6.

Any of our ſubjects living in our dominions may be named as a guardian; and, according to circumſtances, one or more may be named, who may even be conſtrained to accept the guardianſhip, becauſe it is a public burden to which all the members of a ſociety ought to ſubmit.

§ 7.

There is however a diſtinction to be made, namely,

1.) That there are ſome perſons who cannot by any means be appointed guardians.

2.) That there are others who cannot be appointed without our conſent, or without that of the magiſtrate.

3.) Others, in fine, who cannot be forced to accept of a guardianſhip.

§ 8.

One cannot name for guardians,

1.) Such

1.) Such as are deprived of the uſe of their reaſon.

2.) Dumb and deaf perſons.

3.) Women, excepting mothers and grandmothers, of whom we ſhall ſpeak afterwards, tit. IV. § 8. and following.

4.) Minors, even though they may have obtained a diſpenſation for their age, unleſs they have been called to the guardianſhip by the father's will. But in this caſe, as they cannot adminiſter till they be arrived at the age of majority, the magiſtrates ſhall, in the mean time, name another guardian. This ſhall, in like manner, be obſerved, in confirming as guardians ſuch of the neareſt relations, who declaring their willingneſs to accept the guardianſhip, cannot yet adminiſter on account of their minority.

5.) Such who by decree of the magiſtrate, given after a hearing of the cauſe *, and upon informations taken by him, have been declared prodigals, were it even the pupil's own mother.

6.) Clergymen who have no fortune of their own.

7.) A poor man, who is obliged to gain his bread by the labour of his hands, or a fatuous perſon, or a vagabond.

8.) Such as entertain a hatred and deadly enmity againſt the pupils committed to their care, or againſt their relations.

9.) Such as have had, or ſtill have, or are to have afterward, a law-ſuit with the pupil concerning a conſiderable part of his fortune: but if, by his will, the father ſhould have named them guardians, a particular curator or truſtee ſhall be appointed for the management of the law-ſuit.

10.) Such even as owe but little to the pupil, or ſuch as have any claim againſt him, unleſs the father had named them guardians, though he knew of the

* Prævia cauſæ cognitione et decreto judicis.

debt, and had declared, that, notwithſtanding of this, they were to be guardians. If then, excepting in this caſe, a creditor accept a guardianſhip, and take upon him the adminiſtration, he ſhall loſe his action; if it be a debtor who accepts the guardianſhip, he ſhall not afterwards be allowed to propoſe his exceptions; and both ſhall be ſet aſide as ſuſpected.

11.) Such as are not of one of the three religions tolerated in the empire: thus, neither Socinians, nor Quakers, nor the Moravian brethren, nor Herſenhutters, &c. can be charged with a guardianſhip, unleſs it be of pupils of their own ſect.

12.) Jews alſo cannot get the guardianſhip of Chriſtians; but they may be guardians to Jewiſh children.

13.) Infamous perſons, unleſs it be of ſuch as themſelves.

14.) Such as the father has forbidden to be named guardians, even though they were the neareſt relations.

15.) A man who, in a will which he may have drawn, ſhould name himſelf a guardian.

§ 9.

There are ſome perſons who cannot be named or confirmed guardians without our ſpecial permiſſion.

1.) Such are the bailiffs who manage our crown-lands, the receivers of the duties and contributions of the exciſe, and all ſuch as are accountable to us, or charged with our accounts, as alſo ſuch as have in their hands the money of a *cæmmerey*, or the public caſh of a city, borough, or corporation.

When theſe perſons ſhall have accepted of a guardianſhip without ſpecial permiſſion, they ſhall nevertheleſs not be confirmed, nor have the adminiſtration, till they have given particular ſecurity for the ſafety

of

of the pupils, that they may not ſuffer by the claims of our treaſuries, which have a preferable right.

2.) Judges who have ſeats in our judicatures, and there exerciſe their employments, as alſo officers and ſoldiers who are actually in the ſervice.

As to members of the magiſtracy who have none of the money of the *cæmmerey* in hand, they cannot take upon them a guardianſhip, till they have demanded and obtained the approbation of our courts of juſtice.

3.) A father-in-law cannot be charged with the guardianſhip of his ſon-in-law or his daughter-in-law, unleſs there be ſtrong reaſons for conferring it upon him. It is moreover the judge's duty to weigh theſe reaſons, and to examine whether the thing be for the pupil's advantage.

§ 10.

A guardian immediately appointed by us ſhall be bound to notify his appointment, within the ſpace of four weeks, to the judge-ordinary in whoſe juriſdiction the pupil reſides; and if the pupil's ſucceſſion be diſperſed under different juriſdictions, this notification ſhall be made to all the judicatures in which the ſubjects are ſituated. Moreover, this guardian is alſo obliged to perform the conditions requiſite, before he can enter upon the adminiſtration of his guardianſhip.

§ 11.

If one who, by the preſent ordinance, is quite excluded from a guardianſhip, or cannot accept it without having previouſly obtained our conſent, nevertheleſs take upon him the guardianſhip, he ſhall be held for a falſe guardian *; and the magiſtrate who ſhall confirm him, ſhall anſwer ſubſidiarily for all the loſs which may happen from ſuch nomination.

* Pro falſo tutore.

§ 12.

§ 12.

Perſons named for guardians ought uſually to be perſons depending on the ſame juriſdiction as the pupil. Guardians however may be admitted out of another juriſdiction, provided they reſide in our dominions, when they are teſtamentary or legal guardians, or when there are weighty reaſons to deviate from the rule. But in all theſe caſes the guardians ſhall give ſufficient ſecurity, or ſhall preſent a certificate from the judge of their juriſdiction, from which it may appear that they have poſſeſſions, and are ſolvent; and it ſhall moreover be marked in the certificate of what the ſecurity conſiſts.

Our will is alſo, that, in this caſe, the judge who ſhall give the certificate mentioned inſert the guardianſhip in queſtion in his regiſter, and cauſe it to be inſerted in the record of hypothecs or mortgages of the guardian's place of reſidence, that the other creditors may receive no prejudice thereby.

For if, by the negligence of any court of juſtice, the creditors, in ſuch a caſe, ſhould happen to ſuffer any loſs, the judge ſhall be anſwerable for it, and bound to indemnify the creditors out of his own proper money.

§ 13.

If the pupil reſide in one of our provinces, and have ſubjects ſituated in another, it ſhall not be neceſſary to appoint a particular guardian for thoſe effects, unleſs they be very conſiderable, and ſituated in a place very remote from that of the pupil's reſidence: and, in this caſe, we reſerve the right to ourſelves of naming the particular guardian, after having deliberately weighed the circumſtances.

But to avoid all confuſion which may ariſe from the differences of juriſdictions, we ordain, that every judge ſhall name and confirm the guardian of his own province, and ſhall take care of the ſecurity of the pupil;

pupil; and our will is alſo, that the particular guardian give in his accounts only before the court of pupils of his own province: but he ſhall be bound to communicate them to the guardian nominated for the pupil's perſon, that he may give in objections to the accounts which ſhall be preſented to the judge of the place where the effects lie. He ſhall alſo be at freedom to name a perſon to be preſent at the giving up the accounts, and to be careful of the pupil's rights.

§ 14.

When a guardianſhip is appointed by will, or by law, to a ſtranger, or to a perſon reſiding out of our dominions, we do not pretend indeed to exclude him from the guardianſhip: but our will is, that he get himſelf confirmed by the judge of the pupil's juriſdiction, that he bring, in the country, ſufficient ſurety, and that he cauſe it to be regiſtered in the record of hypothecs or mortgages.

§ 15.

With regard to pupils reſiding in our dominions, who ſhall have effects in foreign countries, the guardian by us appointed ſhall, in like manner, take care of thoſe effects; but when the magiſtrate of the place where they are ſituated ſhall appoint a particular guardian to adminiſter them, the guardian by us named ſhall take care that proviſion be made for the pupil's ſecurity; and, for that purpoſe, he ſhall require the judge, in whoſe juriſdiction this particular guardian is, to oblige him to give ſufficient ſecurity to account annually, and to ſend him the incomes of the effects mentioned for the maintenance of his pupil.

§ 16.

Our will is alſo to allow our ſubjects, who ſhall be confirmed guardians by any foreign judge, to accept the guardianſhip conferred by him, provided always that

that he obſerve what has been preſcribed, § 9. n. 2. 3. with regard to perſons who are in our ſervice, or exercise magiſtracies.

But the guardian's effects ſituated in the countries under our dominion ſhall not, for that reaſon, be any wiſe mortgaged, in caſe, according to the laws received in foreign courts of juſtice, that kind of tacit mortgages have any perſonal privilege, and were conſequently to have a preference over recorded mortgages: this is ſo much the more equitable, that, if thoſe laws received in other places were obſerved, the other creditors, who have no knowledge of this guardianſhip, and have found nothing in the records of mortgages concerning thoſe foreign cuſtoms, would be in danger of ſuffering loſſes, without any fault of their own.

Wherefore foreign judges will be careful to provide in another way for the ſecurity of their pupils, or elſe to cauſe the mortgage to be pled before the judge of the place in our dominions where the guardian's effects are ſituated.

When there ſhall be a complaint againſt any of our ſubjects, who, having accepted a foreign guardianſhip, ſhall not adminiſter it with the requiſite fidelity, he ſhall be regarded and puniſhed as a bankrupt, if he cannot, without doing prejudice to other creditors, pay out of his own money the damages which he ſhall occaſion.

We ordain, moreover, that thoſe foreigners ſhall be excluded from guardianſhips in whoſe country our ſubjects are not admitted to adminiſter them.

§ 17.

There are ſome perſons who may accept guardianſhips to which they are appointed, but who cannot be conſtrained to take them upon themſelves contrary to their inclination. We ſhall ſpeak of them in title XI. which

which treats of the reaſons which excuſe one from accepting a guardianſhip.

§ 18.

The ſettlement of a guardian is chiefly made on account of the pupil's perſon, becauſe he is not in a condition to govern himſelf. Guardianſhip, nevertheleſs, extends likewiſe to his effects, becauſe it cannot be ſaid that proviſion is made for the ſafety of pupils, if their effects be not alſo ſecured.

§ 19.

Another guardian cannot be named for a perſon to whom one has already been appointed;

1.) Unleſs his effects be very conſiderable, and ſituated in different provinces; ſee § 13.

2.) Or unleſs the firſt guardian could not give ſufficient ſurety, and for that reaſon the judge might have thought proper to join a ſecond guardian with him;

3.) Or unleſs the firſt guardian had not adminiſtered his charge with the care requiſite;

4.) Or unleſs, for particular reaſons, the judge find it neceſſary to appoint a guardian for a certain time; ſee below, tit. V. § 2.; as alſo in the following caſes:

a) If the father, by his will, have named a minor guardian for his ſon;

b) If the neareſt relation who wants to accept the guardianſhip, be ſtill in minority; ſee § 8. n. 4.

c) If the father have named a guardian conditionally, or to adminiſter the guardianſhip until a certain time *;

d) If the relations diſpute among themſelves concerning their nearneſs of kindred;

e) Or, in fine, if the guardian want himſelf to contract with the pupil.

* Ad certum diem.

§ 20.

There are, however, ſeveral caſes in which a curator or truſtee is given to a pupil who has already a guardian.

1.) When the guardian is hindered for ſome time from adminiſtering.

2.) When the joint guardian is laid aſide as ſuſpected.

3.) When a father ſhall name his creditor, or his debtor, guardian to his ſon, a particular curator or truſtee ſhall be appointed for ſuing of the debt, when a law-ſuit on this head ſhall ariſe between the pupil and his guardian.

§ 21.

Pupils, or *perſons in nonage*, are boys who are not yet fourteen years complete, and girls who are not twelve.

TITLE III.

Of teſtamentary guardianſhip.

(*De tutela teſtamentaria.*)

§ 1.

A Father is not only obliged to take care of his own children during his life, but he ought alſo to think of providing for their ſafety after his death. This is the reaſon for which the laws have given him a power of naming for his children one or more guardians. And this power belongs even to fathers who have not otherwiſe a right of making ſolemn wills.

§ 2.

That a teſtamentary guardianſhip may take place, it is requiſite,

1.) That

1.) That it be the father, or, after his death, the paternal grandfather, who names the guardian. For others, not even the mother, have no right to name a guardian by their will. Nevertheleſs, the caſes muſt be excepted in which a ſtranger might appoint a pupil for his heir, or otherwiſe leave him any thing in legacy; in which caſe he would be at liberty to name, even in the father's lifetime, a guardian, to adminiſter what he may give to the pupil in his will.

2.) That the father have appointed a guardian to his children in nonage, among whom are alſo comprehended poſthumous children. And in caſe the poſthumous child come into the world dead, he who, in the mean time, may adminiſter the fortune, ſhould not be reckoned a guardian; but he ſhould be reckoned as having managed the affairs of the ſucceſſion.

Moreover, a man appointing a guardian to his ſons or daughters, is reckoned alſo to appoint him to his grandſons and grand-daughters, who are included under the general denomination of *children*.

3.) That the children under age be under the power of the father. Wherefore he may name a guardian to the children whom he has diſinherited; but he cannot name one to thoſe whom he has emancipated, nor to his natural children, but in ſo far as he has left them any thing by his will.

4.) That the guardian be named in the father's will: but it is not neceſſary that it be in a ſolemn will; it is ſufficient that this nomination be made in writing, or by word of mouth, by naming the guardian before two unexceptionable witneſſes. See below, § 7.

§ 3.

When one of theſe conditions is wanting, no judge can confirm the father's ſettlement as to the guardian-

ſhip, that the near relations, or the judges, may not be deprived of their rights.

§ 4.

Neither do we grant the father permiſſion to name for guardians the perſons whom we have declared incapable of adminiſtering. See the foregoing title, § 8.

Wherefore a father cannot name for a guardian a man who is diſtracted: but if he do ſo, the nomination ſhall be null, even though he who was diſtracted ſhould come to recover his ſenſes.

We allow, nevertheleſs, a father to name as guardian in his will,

1.) A minor; provided always that he ſhall not adminiſter the guardianſhip till he come of age, and that in the mean time another guardian ſhall be named by the judge.

2.) The pupil's creditor or debtor, when the father was not ignorant of that circumſtance, and has even expreſsly mentioned it in his will.

§ 5.

The father ſhall alſo have power to name a guardian under certain conditions, or to be ſo till a certain time.

§ 6.

Such a guardian ſhall not be bound to give ſurety; but it ſhall be ſufficient that the father eſteemed him an honeſt and truſty man.

The caſe muſt be excepted when, after a guardian has been named, new circumſtances have happened which require him to be obliged to give ſurety.

§ 7.

The guardian named by a father in his will, as well as he who is named by a ſtranger for the adminiſtration of what he leaves to a pupil by his will, ſhall

ſhall be confirmed by the judge, even though the will in which they are named could not ſubſiſt for want of being executed with the requiſite ſolemnities. And theſe teſtamentary guardians ſhall be preferred to legal guardians; (ſee above, § 2. n. 4.), provided they be not perſons whom the law excludes from guardianſhips. (See § 4.)

If they be perſons who cannot accept of a guardianſhip till they firſt require our conſent, or that of the judge, neither ſhall they be confirmed till they obtain it.

TITLE IV.

Of the guardianſhip with which the neareſt relations are intruſted, or of the legal guardianſhip.

(*De tutela legitima.*)

§ 1.

WHen a father has named a guardian by his will, the legal guardianſhip cannot take place;

a) Even though the guardian named, or if there be more, though one of them ſhould happen to die, after being intruſted with the guardianſhip.

b) Or though the guardian named ſhould refuſe to accept;

c) Or though he were laid aſide on account of his maleadminiſtration. For, in all theſe caſes, it ſhall be the judge's buſineſs to appoint other guardians. See the following title, § 1.

§ 2.

a) But if a father have named no guardian by his will,

b) Or if he who is named cannot be guardian;

c) Or

c) Or if he happen to die before the father, the pupil's neareſt relations ſhall be obliged to take upon them the guardianſhip.

§ 3.

Thence it follows, that the father is chiefly obliged, both by virtue of the paternal power, and on account of the nearneſs of relation, to take upon himſelf the adminiſtration of the fortune which has fallen to his children, either by ſucceſſion or otherwiſe; and that even though he were excluded from the uſufruct of theſe effects.

§ 4.

In order to take upon himſelf this adminiſtration, the father needs not be confirmed by the judge. Nevertheleſs our will is, that, for greater ſafety and exactneſs, he ſhall notify, within ſix weeks after the ſucceſſion, *&c.* falls, that he has taken upon himſelf to adminiſter it; and that, at the ſame time, he deliver to the judge a particular account of all the effects fallen to his children, which muſt be upon oath. If he neglect to do ſo, he ſhall be condemned in a fine of ten to twenty rix-dollars, and he may even, according to the circumſtances, be deprived of the adminiſtration of the effects, as well as of the uſufruct. Neither is it our will that he be reſtored to that right, nor have any other remedy whatever againſt ſuch judgment.

The father, when he marries again, does not loſe the adminiſtration of the fortune of his children; but he ſhall be ſupported in it, provided he have ſettled with them before he marry again.

If he marry again without ſettling with his children, he ſhall not only be deprived of the adminiſtration and uſufruct of their effects, but he ſhall be condemned in ſome penalty. See above, book II. tit. III. § 24. let. i.

In

In caſe the father, whether he marry again or not, happen to diminiſh or ſquander the fortune of his children, or not to give them ſuitable maintenance, he ſhould be bound to give ſurety, both for the ſecurity of their effects, and for that of their ſuitable maintenance; about which both the relations and the judge ſhall be attentively watchful, and, if it be neceſſary, he ſhall regulate the ſum proper to be laid out on their maintenance. If the father cannot give ſurety, or if his behaviour be ſo viſibly bad, that there is reaſon to fear he may ſquander their effects, the adminiſtration ſhall be taken from him, and even the care of the education of his children; and both ſhall be intruſted by the judge to their neareſt relations, or, according to circumſtances, to ſtrangers, who ſhall be thought capable of the charge. Neither is it our will that the remedy againſt ſuch judgments ſhould have any other effect than that of an *appeal* *, which does not hinder immediate execution of the ſentence.

Moreover, the near relations, as well as the judge, ſhall be intitled to take care that the father ſhall give a ſuitable maintenance to his children; and, in any caſe, the judge may determine a certain ſum for that maintenance.

§ 5.

When children happening to marry, or take up houſe, ſhall ſeparate themſelves from their father with his conſent, he ſhall deliver to them their fortune, ſuch as the particular account which he ought to have made of it bears, as has been ſaid, with the price of the things which he may have alienated, and ſhall give a faithful account of his adminiſtration.

§ 6.

But, the better to provide for the ſecurity of the

* Quoad effectum devolutivum.

children;

children, our will is, that the father's effects be mortgaged, or hypothecated to the children, from the time that he took upon him the adminiſtration.

§ 7.

Moreover, our will is, that the father ſhall not have power to alienate the childrens effects, unleſs he obſerve the formalities requiſite in diſpoſing of the effects of pupils. See below, tit. VI. § 38. and following. But when the children have declared themſelves heirs of their father, they ſhall be bound for his fact and deed.

§ 8.

After the father's death, if he have named no guardian for his children, the mother may, if ſhe pleaſe, take upon herſelf the guardianſhip of them.

§ 9.

But, in order to be admitted, it is requiſite,

a) That ſhe be of age, and be twenty-five years complete. If ſhe be not of that age, the judge ſhall name a guardian to adminiſter in the mean time. It is further requiſite,

b) That ſhe take upon herſelf the guardianſhip freely, without being conſtrained to it, and ſolely from a motive of affection for her children.

c) That ſhe have ſufficiency of effects, or, not having them, ſhe ſhould give ſolvent ſurety for her adminiſtration.

d) Or, at leaſt, that ſhe have the reputation of an honeſt woman, and good œconomiſt.

e) That ſhe cauſe a formal inventory to be made of the effects of the ſucceſſion, and of what may otherwiſe fall to her children; or, at leaſt, an exact account, ſuch as ſhe may give upon oath, if required.

f) That ſhe renounce ſecond marriages, promiſing that, in caſe ſhe ſhould marry again, ſhe will immediately lay down the guardianſhip.

g) That

g) That ſhe renounce alſo, with regard to the adminiſtration of guardianſhips, all the privileges granted to wives, and, in particular, the benefit of the Velleian decree, which privileges ſhall be diſtinctly and ſufficiently explained to her in every particular occaſion.

h) In fine, that ſhe promiſe not only to adminiſter faithfully the effects themſelves, but alſo to be accountable for the incomes and fruits which ſhe ſhall receive.

When a mother wants to be confirmed guardian for her children,

1.) The judge ſhall repreſent to her, that if ſhe do not find herſelf capable of adminiſtering the guardianſhip alone, ſhe ought to demand one or two relations, or, failing them, ſome underſtanding perſons, to be joined with her, and to aſſiſt her with their counſel in the adminiſtration of the affairs of the guardianſhip.

2.) The judge ſhall alſo declare, that if ſhe intend to marry again, ſhe ſhould be obliged previouſly to get the rights of her children ſettled; failing of which, her own effects, and even thoſe of her ſecond huſband, will be hypothecated, or mortgaged for the whole, to the pupil; as the ſecond huſband ought not to be ignorant, that he cannot marry a widow, till ſhe have previouſly ſettled with the children of the firſt marriage.

§ 10.

If the mother will not take upon her the guardianſhip, or if ſhe be dead, the grandfather, and, failing of him, the grandmother, ſhall be admitted into the guardianſhip; provided always that the grandmother ſhall alſo obſerve what is preſcribed for the mother in the preceding article. And if both grandmothers be alive, they ought both to be admitted guardians.

§ 11.

When a mother or grandmother ſhall once have loſt the guardianſhip of her children for marrying again, ſhe cannot afterwards be admitted to the management, even though ſhe ſhould become a widow again, and have no children by her ſecond huſband. For our pleaſure is, that the guardian ſettled in her place ſhall continue in the adminiſtration, or, if it be neceſſary, that another be named.

§ 12.

We ordain alſo, that the adminiſtration of the mother, and of the grandmother, as well as that of the grandfather by the mother's ſide, cannot be extended beyond the care of the pupil's perſon and allodial effects; willing that the noble effects, which he has got by the agreement and foreſight of his anceſtors *, and to the ſucceſſion of which the relations by the father's ſide alone are called, be adminiſtered by the neareſt agnat.

Nevertheleſs there are caſes in which the mother or grandmother ought not to be excluded from this adminiſtration, as if there were no agnat, or, if the neareſt agnat were more than one hundred miles diſtant, or if there were ſtrong reaſons for leaving the adminiſtration of theſe effects to the mother, of which the judge ſhall take cogniſance, or if the mother herſelf declare her inclination to adminiſter theſe effects jointly with one or two agnats.

§ 13.

When the mother or grandmother ſhall adminiſter the fortune of their children or grandchildren amiſs, and ſhall begin to diminiſh or ſquander it, or when they ſhall not give them a ſuitable maintenance, pro-

* Ex pacto et providentia majorum.

ceſs

ceſs ſhall iſſue againſt them in the manner preſcribed in § 4. with regard to the father's guardianſhip.

§ 14.

Failing the mother, or grandmother, or when neither incline to accept the guardianſhip, the pupil's neareſt heir ſhall be bound, on pain of loſing his right of ſucceſſion, to take upon himſelf the guardianſhip, provided no incapacity exclude him from it, and he have no argument of excuſe to be diſpenſed from it.

§ 15.

As agnats are preferred to cognats, with regard to ſucceſſion in fiefs, though become allodial, and in feoffments in truſt, they are alſo obliged to accept, preferably to cognats, the guardianſhip of the pupil their relation; and, if they refuſe it, they ſhall incur the penalty mentioned in the preceding article.

§ 16.

If it happen that the pupil have, in a collateral line, two relations of the ſame degree, they ſhall both jointly be charged with the guardianſhip; but if they be more in number, the judge ſhall chuſe two of them for the management, and the others ſhall be regarded only as honorary guardians.

§ 17.

If ſome of the agnats reſide in foreign countries, ſuch as are in the place ſhall preferably be intruſted with the guardianſhip, if they can, beſides, * perform the conditions required of guardians.

§ 18.

Moreover, it muſt be remarked, that, when a guardian is to be choſen among the neareſt relations, regard muſt be had to the right of repreſentation, which takes place in favour of nephews, of brothers ſons,

* Præſtare præſtanda.

who ſtand, in this caſe, in competition with their uncles.

TITLE V.

Of the guardianſhip conferred by the magiſtrate, and of the perſons who are charged to demand the ſettlement of a guardian.

(*De tutoribus datis ab his qui jus dandi habent, &c. Qui tutores petant et ubi petantur.*)

§ 1.

WHen a father dies without making a will, and the pupils have no relation fit to be their guardian, the judge ſhall be intruſted with the care of giving them good guardians. See above, book III. tit. II. § 3.

§ 2.

There are even caſes in which the judge is obliged to give them guardians, though there be ſome already named by their father's will; namely,

a) When the guardians named, or one of them, is dead.

b) When they have excuſed themſelves;

c) When they are under age;

d) When they have been ſet aſide on account of malverſation;

e) And when they are named by the father only conditionally, or to a certain time.

In this caſe, the judge ſhall appoint others to adminiſter the guardianſhip, either for a time only *, or for all the time that the guardianſhip is to continue, if the father's ſettlement be entirely ineffectual.

* Ad interim.

For

For the neareſt relations, if there were any, cannot be admitted to it, becauſe the father, by his ſilence concerning them, has ſufficiently teſtified that he had no confidence in them.

§ 3.

The obligation of the judge to appoint guardians for pupils ſubſiſts ſtill in certain caſes, though there be relations to whom, except in theſe caſes, the guardianſhip ſhould be intruſted, namely,

a) When the neareſt relation is himſelf under age.

b) When he has excuſed himſelf from it for good reaſons.

c) When he has been ſet aſide as ſuſpected.

d) Or when he dies after having begun to adminiſter the guardianſhip.

e) When relations diſpute concerning proximity.

f) Or, in fine, when the mother marries again.

In all theſe caſes the judge is to appoint a guardian for a certain time, or even for all the time that the guardianſhip is to laſt, if the legal guardian, after being admitted, have become quite incapable of adminiſtering.

Nevertheleſs, in theſe ſame caſes, the other near relations ſhall not be excluded from the guardianſhip, if they demand it, and be of age and capable of being guardians, unleſs the judge have weighty reaſons for preferring ſtrangers to them; for in appointing guardians he ought to have more regard to the advantage of the pupils than to proximity of kindred.

§ 4.

Any judge who has an ordinary juriſdiction, and within which the pupil's parents have conſtantly had their reſidence, may appoint one or more guardians to adminiſter his effects. If his father and mother had no certain reſidence, the judge-ordinary of the place where

where the pupil ſhall be at the time of their deceaſe, ſhall appoint the guardian.

1.) When the pupil's father and mother have had two different places of abode, reſiding ſometimes in the one and ſometimes in the other, our will is, that what is called in that place *anticipation* *, ſhall take place, that is to ſay, that the nomination of the judge who firſt ſhall iſſue an act of guardianſhip in the requiſite forms ſhall have its effect, and the guardian appointed by him ſhall be the real guardian.

2.) When a pupil ſhall have a conſiderable part of his effects ſituated in another town or province of our dominions than that of his reſidence, the judge of the place where thoſe effects are ſituated, may, if he thinks it advantageous for the pupil, on account of the guardian's diſtance, or for other weighty reaſons, appoint a particular guardian for them.

3.) But if the pupil had a real eſtate ſituated in foreign countries, the guardians named by our judges, whom they ſhall not there be pleaſed to acknowledge as guardians, ſhall nevertheleſs take care, that the judge of the place where theſe eſtates are ſituated, appoint a joint guardian to adminiſter them.

§ 5.

If it happen that pupils be without parents, and without effects, they ſhall not for that reaſon be without guardians; but the judge ſhall take care of his own accord to appoint for them, and that within the ſpace of four weeks at fartheſt, reckoning from the death of the father and mother, a guardian, who ſhall be charged with the care of their education, and to do all that is in his power to procure them a ſettlement; but he ſhall not be obliged to afford them maintenance out of his own money, the judge who

* Præventio.

has

has named him being to provide means for maintaining them.

§ 6.

The judge ſhall not appoint to a guardianſhip perſons incapable of it, nor ſuch as by illicit methods endeavour to get themſelves admitted, and who can only be regarded as intruders; nor ſuch as have been rejected by the fathers and mothers of the pupils.

§ 7.

As the judge is not always informed that there are pupils to whom guardians muſt be appointed; it is neceſſary to know who is to apply to him to get them named.

§ 8.

On this occaſion muſt be remembered what has been already intimated in § 10. of tit. IV. namely, that before all things the mother, and failing of her the grandfather by the father's ſide, and after him the grandmother by the father's ſide, and if they be both dead, the maternal grandfather, and after him the grandmother by the mother's ſide, are obliged, under pain of loſing the right which proximity gives them to the guardianſhip, to apply to the judge, there to declare that they take upon them the guardianſhip of their children; or when they have arguments to excuſe them from it, to propoſe, within the ſpace of ſix weeks, one, two, or more perſons, and to demand that one of them be choſen and confirmed to adminiſter the guardianſhip.

§ 9.

Neither ſhall it be ſufficient that they have applied for this purpoſe once or twice to the judge; for if the guardian whom they propoſed excuſe himſelf, or be rejected by the judge, they ſhall immediately aſk another to be named.

§ 10.

§ 10.

In caſe the mother or grandmother have allowed three months to elapſe, reckoning from the father's death, without propoſing a guardian, and the ſon or grandſon die before the age of puberty, ſhe ſhall loſe all his ſucceſſion, which ſhall fall to be divided to the pupil's other near relations; nor ſhall even the mother's ignorance of the law, nor her ſimplicity ſerve her for an excuſe.

Nevertheleſs, if ſhe were ſtill under age, ſhe ſhall not loſe her ſucceſſion, in conſideration of her nonage; but if it appear, that through malice ſhe has neglected to demand a guardian, ſhe ſhall be puniſhed for it according to circumſtances.

§ 11.

The other relations and allies of pupils ſhall likewiſe be obliged, if there be no mother, or other aſcending relations, and if they have themſelves arguments of excuſe, to propoſe to the judge guardians for the pupils, and timeouſly to ſolicit their nomination.

This obligation particularly concerns the neareſt relations, who, if they be in the place, ſhall be obliged, under diſcretionary penalties, to ſolicit the judge for the nomination of a guardian: they ſhall be bound to demand this within the ſpace of four weeks, reckoning from the day of the father or mother's death: if they do not demand it within that time, and if they ſtill neglect to do ſo for another ſpace of ſix weeks, they ſhall loſe the half of what would fall to them of the ſucceſſion of the pupils, in caſe they happen to die before the age of puberty, which half ſhall belong to the other neareſt relations after them.

As often as the neareſt relations of the pupils ſhall neglect theſe precautions, ſuch as follow them in degree of proximity, and who, by the negligence of the firſt, acquire the right of ſucceeding to the pupil, ſhall

ſhall be bound, under the ſame penalty, to demand, within the ſpace of four or ſix weeks at moſt, the ſettlement of a guardian.

§ 12.

Our will is alſo, that all fellow-ſubjects have right to ſolicit the nomination of a guardian; which ſhall eſpecially be allowed to ſuch as have an intereſt in the matter, ſuch as to a creditor who is at law with a pupil; and others who have affairs to ſettle with him.

§ 13.

In fine, the perſon under age may apply to the judge to get a guardian appointed.

§ 14.

When no body ſhall ſolicit the nomination of a guardian, the judge ſhall provide for it immediately of his own accord. Moreover, our pleaſure is, that he ſhall not appoint a guardian conditionally, nor only to adminiſter for a certain time.

§ 15.

As it much concerns the pupil that care be taken to ſecure the ſucceſſion, ſuch as want to be guardians, or who are obliged to propoſe them, ſhall be at all pains to prevent any of the pupil's moveable effects from being embezzled; and for this purpoſe they ſhall require the judge ſpeedily to ſeal every thing that can be locked; which he ſhall do, without raiſing difficulties, immediately after being aſked.

Our will is even, that the ordinary judges, who have no juriſdiction over perſons in our ſervice, nor over the nobility, may nevertheleſs cauſe a ſeal to be put by a notary on the effects which the nobility or military ſhall leave; which may alſo be done at the houſes of gentlemen in the country, though they have not reſided on their eſtates, nor have died there.

§ 16.

And the better to provide for the ſecurity of pupils, we enact and ordain,

1.) That the domeſtic ſervants of one who happens to die leaving pupils, ſhall be bound, when the mother and the other relations are not in the place, immediately to inform the judge in whoſe juriſdiction the defunct died; who ſhall forthwith cauſe his repoſitories to be ſealed by one of the members of court, or by a notary, and ſhall ſeriouſly exhort the perſons who may be in the funeral houſe, (eſpecially if all the precautions requiſite in ſuch caſes have not been taken at firſt), to conceal nothing of the effects of the ſucceſſion; declaring to them, that if it happen to be known that they have concealed any thing, they are to expect to be ſeverely puniſhed for it.

2.) That little ſhall be taken for the dues of ſealing, whether it be required or ordered by the judge: that the ſealing cannot be hindered under any pretext whatſoever; and that, after ſealing, the judge ſhall, with all convenient diſpatch, proceed to the making up of the inventory.

3.) But if the pupil have a father or mother, a grandfather or grandmother, and they offer judicially to make a particular account of the effects, ſuch as they can give upon oath if required, it ſhall not be neceſſary to ſeal or make an inventory, as the judge is to ſatisfy himſelf with drawing up a memorial of what paſſed, and of the reaſons which he had for not putting his ſeal on the repoſitories, and making an inventory.

§ 17.

Any one who ſhall expend any thing for the ſettlement of a guardian, may redemand it by an action for buſineſs done *, unleſs ſome one had offered to do it at his own charges.

* Actione negotiorum geſtorum.

§ 18.

§ 18.

And as we have eſtabliſhed, as is known, a court for pupils, for the ſake of the defunct *, our pleaſure is, as we have already made it known, that the court ſhall not wait till guardians make application, or till ſuch as are bound to ſolicit for their nomination propoſe them; but our will is, that as ſoon as the court ſhall learn that any one is deceaſed leaving pupils, or that there are any furious or fatuous perſons, who conſequently are not in a condition to manage their own affairs, the court ſhall be careful to have the repoſitories ſealed, and guardians or curators appointed for them.

§ 19.

But that the court of pupils may be timeouſly informed of the caſes of which it ought to take cogniſance, we ordain,

1.) That when a perſon happens to deceaſe, leaving children in nonage, all ſuch as are called to the guardianſhip, whether by will, or by proximity of kindred, ſhall notify the death to the court, under pain of twenty rix-dollars of fine, within the ſpace of four weeks, reckoning from the day that they ſhall hear of his deceaſe.

2.) That all ſuch as are obliged to propoſe guardians, ſhall likewiſe be bound, under the ſame penalty, to notify to the court, within the ſpace preſcribed, the death of perſons deceaſed, leaving children in nonage.

3.) That notaries and ſecretaries employed in ſealing up the repoſitories, and in making the inventory, ſhall likewiſe be under this obligation.

4.) As well as the judges of the place in which the deceaſe happens, though the defunct were not under their juriſdiction.

* Eximirte.

5.) That the fiſcals of every place ſhall inform themſelves alſo of theſe ſort of deceaſes, in order to adviſe the court, when they ſhall come to their knowledge.

6.) But that it ſhall chiefly be the duty of paſtors officiating in town and country, to make this notification to the court of pupils, at fartheſt within four weeks after the interment, and under pain of five rix-dollars of fine. They ſhall particularly mark how many children the defunct leaves, who are the neareſt relations, and where they reſide.

And that none, and eſpecially miniſters, magiſtrates, and fiſcals, may pretend to excuſe their negligence on this head, under pretext of ignorance of the preſent ordinance, our pleaſure is, that the court of pupils cauſe to be publiſhed, every three months, in the billet of intelligence, the following advertiſements.

1. *Be it known, for the ſecurity of pupils, and of ſuch as are not in a condition to manage their own affairs, that both ſuch as are called to be their guardians by will, or by proximity of kindred, and ſuch as are obliged to demand that guardians and curators be named for them, ought, within the ſpace of four weeks, reckoning from the time they were informed of the defunct's death, or their own nomination to the guardianſhip, to notify to the court of pupils the deceaſe of the defunct, and the number of children in nonage which he leaves, as alſo who are the neareſt relations, and where they reſide.*

2. *That notaries and ſecretaries who may have been employed in ſealing up the repoſitories, and making the inventory, ought alſo to make the ſame notification within eight days, reckoning from the time of their being required to proceed on that buſineſs.*

3. *And that it belongs eſpecially to miniſters to make the notification mentioned within the ſpace of four weeks after*

ter the interment. Moreover, all of them are advertiſed that, if they fail to acquit themſelves of what is preſcribed to them on this head, they ſhall undoubtedly be condemned in the fine which they ſhall incur by their negligence.

§ 20.

If the court of pupils come to be informed, that, by the death of a perſon, there is occaſion for the appointment of a guardian, the day of the deceaſe ſhall immediately be inſerted in a particular regiſter; and if, after having taken information concerning the affixing of the ſeals, the court find that they have not been affixed, that ſhall immediately be ordered to be done by authority of court. But if nothing were to be feared from the delay, and if it do not appear neceſſary immediately to take ſome precautions, the court may wait till the terms fixed for demanding a nomination of guardians be elapſed.

When the nomination of a guardian ſhall be made at the requiſition of any perſon, or by authority of court, if neglected to be required, the nomination ſhall, in like manner, be inſerted in the regiſter mentioned; and if the guardian neglect to perform his duty, he ſhall ſeriouſly be exhorted to do it, and he may even be reprimanded for neglect, according to circumſtances.

Care ſhall alſo be taken to inſert briefly in the above-mentioned regiſter of guardianſhips, all that ſhall be demanded and ordained, and whatever concerns guardianſhips; in particular, if the guardians have given up their accounts, how they have accounted, what balance there is, if the ready money have been laid out or depoſited, *&c.* that recourſe may be had to the acts of guardianſhip, and there may be ſeen at one view all that has paſſed on this occaſion: but if there be a will, the guardian ſhall alſo inform the court of it, that it may be mentioned in that regiſter.

Moreover,

Moreover, that regiſter ſhall be ſo formed, that, by conſulting it, may not only be ſeen, in brief, if what is preſcribed by this ordinance have been obſerved; but alſo with how many guardianſhips one guardian is charged; whether he adminiſters, or is only an honorary guardian; and whether he have in his hands little or much money belonging to his pupil. But if the pupil have effects ſituated in another juriſdiction, where the accounts of them are to be particularly given up, it ſhall be ſufficient to inſert in the regiſter, to what judge application muſt be made, to be informed of what concerns them.

In fine, our will is, that, in conformity to the practice, with reſpect to records of hypothecs or mortgages, the court, if required, ſhall give to any one to whom the guardian is indebted, or from whom he wants to borrow any money, or on whoſe account he has become, or intends to become ſurety, a certificate, containing the principal circumſtances juſt mentioned, that every one may govern himſelf thereby, and take ſuch meaſures as to him ſhall ſeem moſt proper for his own ſecurity. In this manner, guardians will be induced, for their own credit, to be very exact in their adminiſtration; by this alſo our fiſcals, who ought carefully to inform themſelves of this matter, will have an opportunity to judge, whether our ordinance be put in execution; and we moſt expreſsly recommend to them to perform the duty of their employments, againſt ſuch as ſhall neglect to obſerve what is here preſcribed.

TITLE

TITLE VI.

Of the adminiſtration of guardianſhips, comprehending both the education of pupils and the adminiſtration of their effects.

(*De adminiſtratione tutorum, et ubi pupillus morari vel educari debeat, &c.*)

§ 1.

BEfore a guardian can enter on the exerciſe of the office conferred on him, he is obliged,

I. To demand his confirmation from the judge, even though he be named to the guardianſhip by will, either of the father or of a ſtranger.

§ 2.

He ſhall demand this confirmation from the judge under whoſe immediate juriſdiction he lives; and that this demand may be made timeouſly, we ordain,

1.) That all ſuch as have been named guardians by will, ſhall apply, for that purpoſe, to the judge, within the ſpace of four weeks, reckoning from the time that the will ſhall be publiſhed and communicated to them;

2.) And that ſuch as are called to the guardianſhip by nearneſs of kindred, ſhall make this demand within four weeks, after they are acquainted of the death of their relation.

§ 3.

This ſhall alſo be obſerved by the mother and grandmother, who ſhall be obliged to make their declaration within the ſpace mentioned, and perform the conditions required of them by the preſent ordinance,

dinance, in order to render themſelves capable of adminiſtering for their children, and alſo to get, for this purpoſe, an atteſtation from the judge.

§ 4.

But we reſerve to ourſelves immediately the giving of this confirmation, and the iſſuing acts of guardianſhip in certain caſes, in which we ſhall think it neceſſary; eſpecially as to guardians who cannot accept the office without our permiſſion.

Provided always that the guardian confirmed by us, ſhall be obliged to notify his nomination to the judge competent, within the ſpace of four weeks; and if the ſucceſſion be diſperſed in different juriſdictions, the notification ſhall be made to each of thoſe judges, before whom he ſhall alſo be obliged to produce his accounts: if he refuſe to do ſo, they ſhall immediately report it to us, and ſhall wait our further deciſion.

§ 5.

If a guardian (except in the caſes which ſuffer no delay, and of which he is immediately to inform the judge) take upon him to adminiſter the office, before being confirmed, our pleaſure is, not only that the act be null, but alſo that he incur a fine of ten rix-dollars payable to the fiſcal; and if he do it maliciouſly, that he be puniſhed more ſeverely for it.

No guardian can then, before his confirmation, ſue or be ſued in his quality of guardian; and we prohibit the judges to receive him in that quality, till he have legalized his power, by producing the act of guardianſhip. It is moreover underſtood, that it would be ſuperfluous to produce this act to the judge, who himſelf had eſtabliſhed and confirmed the guardian.

§ 6.

The guardian, on the contrary, who ſhall neglect to

to put himſelf in a condition to adminiſter, to demand his confirmation within the ſpace preſcribed, and to perform the conditions required of guardians before they can enter upon their adminiſtration, ſhall be anſwerable to the pupils for all the loſs which his negligence ſhall occaſion.

§ 7.

II. Our will is, that, in confirming a guardian, the following form of an oath be ſhown to him, and that he promiſe to comply with it in every thing, and in all caſes, as far as the ſituation of the pupils can allow. This oath is to be taken by giving his hand to the judge; (or *Vermæge eines Handſchlages.*)

Form of a guardian's oath; which may alſo be adminiſtered to a curator, by putting in place of the word *pupil* that of *minor*, and by not obliging him *to take care of the perſon and education of the* minor.

I N. N. ſwear and promiſe before God, That, having been confirmed guardian of the pupil N. N. who is intruſted to my care, I will be faithful in my adminiſtration, and will provide, as far as in my power, for the preſervation of his perſon and effects: that I will be as attentive as poſſible that he get a good education: that I will not alienate his funds, if he have any, without the permiſſion of the judge, but that I will preſerve them in a good condition: that I will defend his perſon and effects, either judicially or extrajudicially, and that I will neglect nothing that may be for his advantage: that I will make an exact ſtate of his effects, and will cauſe an inventory of them to be drawn up: that I will give in my accounts at the time and in the manner preſcribed, that is to ſay, every year, and that I will not ſuffer more than two months to elapſe after the expiration of every year, without aſking a commiſſioner to be named, and a time to be fixed for receiving my accounts,

which I will deliver for that purpoſe: that I will alſo deliver to the judge all that ſhall be recovered of ready money belonging to my pupil, in order to keep it carefully myſelf, after the judge ſhall put it under his ſeal, or, in order to depoſit it in court, if the judge think proper, till it can be laid out with his conſent to my pupil's advantage: that I will make no purchaſe of his effects, either by myſelf, or by third perſons; but that I will deliver to him in due time all that ought to accrue to him, by giving an exact account of all my adminiſtration: in fine, I will behave myſelf in every thing, and every where, as becomes a faithful guardian, and an honeſt man; and ſo truly may God be my help, through his Son Jeſus Chriſt. Amen.

We have already remarked above with reſpect to the mother and grandmother, that if they incline to be guardians, they muſt perform beſides certain conditions, which are enumerated in tit. IV. § 9.

§ 8.

III. Guardians are obliged to give good and ſufficient ſurety; and our will is, that no other perſons be confirmed as guardians but ſuch as have eſtates, or can produce the ſurety requiſite. Nevertheleſs, if the judge find himſelf obliged, for want of proper perſons, to intruſt guardianſhips to perſons of no eſtate, or not in a condition to bring ſurety, he ſhall carefully inform himſelf concerning their conduct, and how they manage their own affairs: and, in this caſe of neceſſity, he may, without requiring ſurety, chuſe ſuch of whoſe probity and conduct he ſhall get good evidence. We have already intimated that guardians named by the father's will, are uſually excuſed from giving ſurety. See above, tit. III. § 6.

§ 9.

IV. A guardian is obliged, before taking into his keeping the effects of the pupils, and beginning his adminiſtration,

adminiſtration, to cauſe to be drawn up an inventory complete, diſtinct, faithful, and according to the order obſerved in the form in the appendix, N. 1. of all their effects, moveable and immovable, debts, bills, writings, papers, *&c.* by ſome member of the court, or, at leaſt, by a notary, aſſiſted with two unexceptionable witneſſes.

If the guardian, nevertheleſs, incline himſelf to make an exact and particular account of the effects, he may do ſo, provided he make it ſuch as he can give oath upon it, when required. But in caſe he have ſuffered to elapſe the ſpace of four weeks, reckoning from the time he was confirmed, without doing either the one or the other, he ſhall be condemned in a fine of fifty rix-dollars, or in ſome other equivalent penalty, unleſs he has been diverted from it by ſome weighty reaſon, or by ſome lawful impediment, ſuch as contagion or war; willing, nevertheleſs, that, in this caſe, he inform the judge of it, and, in the mean time, keep all his effects locked up and ſealed. But if he make neither an inventory nor particular account, not only ſhall he be ſet aſide from the guardianſhip, and branded with infamy; but the pupil, or minor, ſhall alſo have a right to ſue him, and to found his action againſt him on the oath which is called *in litem:* nor can the pupil's claims be modified. And our will is, that if the guardian be inſolvent, he be treated and puniſhed as a real bankrupt, in conformity to the edicts publiſhed againſt fraudulent brankruptcies.

§ 10.

Moreover, neither the father who adminiſters the fortune of his own children, nor the mother who takes upon her the guardianſhip of them, can be excuſed from making an inventory, or a particular account on which they can give oath; and even though the teſtator ſhould have prohibited the making an in-

ventory, or have declared that the guardian ſhould not give oath on the particular account, or though he ſhould even have reduced his children to their legitim, in caſe they required any ſuch thing of the guardians named by him; they ſhall neverthleſs be obliged (without even excepting the parents aſcending) to make a particular account of the effects, ſuch as they may be always in a condition to give oath upon, when they ſhall be required.

This precaution is abſolutely neceſſary for the ſafety of the pupils; on the one ſide, to take from the father and mother every opportunity of conveying away or ſquandering their childrens fortune, and, on the other, that the children may know exactly what they have to claim when the father or mother marry again: for if they ſhould delay making a particular account of their childrens effects till the time they intend to marry again, it would probably happen that they would forget ſeveral articles, and would thus do a prejudice to their children. Beſides, we neither can, nor is it our will to excuſe any guardian from the obligation of giving in his accounts annually; and it is evident, that it is not poſſible for a guardian to give every year an account of his guardianſhip, if he have not firſt of all begun with drawing up an inventory of his pupil's effects.

§ 11.

After the guardian ſhall have fulfilled all the conditions juſt enumerated, and ſhall thus put himſelf in a condition of adminiſtering the guardianſhip, he may take upon himſelf the adminiſtration, which conſiſts in the education of the pupils, ſee art. I. and in the management of their effects, ſee art. II.

ART.

ART. I.

Of the education of pupils.

§ 12.

IT has already been obſerved in title II. §. 18. of this book, that a guardian is chiefly given for the pupil's perſon; whence it follows, that care is to be taken of his education, and this ſo much the more, as the public is concerned that children be well educated.

§ 13.

Above all things attention is to be given in the education of pupils to what the father has ordered on this head in his will.

§ 14.

If the father have ordered nothing, it belongs to the mother to take that care, as long as ſhe continues a widow.

§ 15.

If the mother marry again, the judge has a right either to leave her her children, or to intruſt them to the care of ſome other perſon.

§ 16.

When the mother is dead, or has good reaſons not to intermeddle with the education of her children, or when the judge does not think it convenient to intruſt her with that charge, the paternal grandfather, and after him the grandmother on the father's ſide, *&c.* ſhall be obliged to take care of their education.

In both caſes the judge ſhall have a right to conſtrain the relations mentioned to take the children home, and to ſee to their education, in caſe they refuſe to do it willingly.

§ 17.

§ 17.

When there are no aſcendant parents, or when they aſſign weighty reaſons for being freed from the education of their children, or when there are juſt cauſes to deprive them of it, the other guardians, in whatever manner they have been called to the office, by will, by proximity, or by the choice of the judge, ſhall carefully ſee that the education of the pupils be intruſted to perſons, who, it is certain, will take good care of it.

§ 18.

If one to whom a legacy is left, or who has been appointed heir, be at the ſame time intruſted with the education of the children, and refuſe to do it, he ſhall be deprived of the legacy, or of the ſucceſſion.

§ 19.

Guardians are chiefly obliged to provide for the ſuſtenance and cloathing of their pupils, in proportion to their fortune; and in order to regulate the diſburſements to be made on this head, what follows ſhall be obſerved,

1.) If the father have determined what is to be expended on the education of his children, the guardian ſhall keep by his ſettlement: nevertheleſs, if the ſum be too great or too ſmall, things may be otherwiſe regulated by the judge, according as equity and decency ſhall require.

2.) If the father have determined nothing upon it, and if the judge, on receiving the guardian's accounts, obſerve that he expends too much, or too little, as if he had appointed no maſters for the pupil, *&c.* it is the judge's duty to regulate, by virtue of his office, what is to be beſtowed on their education, and to order, according to circumſtances, either that the guardian expend more or leſs.

If the ordinary incomes of the pupils be not ſufficient

cient to give them an education ſuitable to their ſtation, the judge may allow the guardian to raiſe capital ſums for that purpoſe, which ſhall be allowed to him in his accounts.

§ 20.

If the pupils be poor, and have not effects ſufficient to afford them education, the guardians ſhall not be obliged to afford it of their own; but they ſhall be bound to inform the judge of it, and to aſk his advice concerning the method of providing for it: and in this caſe our will is, that the judge endeavour to get them received into hoſpitals, orphan-houſes, &c. and that he beſtow on them the care and attention which their ſituation demands, ſo as he can be anſwerable for it before God, and before us.

§ 21.

Guardians ſhall early ſend their pupils to ſchool, and ſhall take care that they go thither conſtantly, and do not leave it of their own accord; they ſhall take care that they be exerciſed and inſtructed at home in piety, in prayer, in the catechiſm, and eſpecially in the frequent reading of the holy ſcriptures: they ſhall alſo take care that their pupils, when they ſhall arrive at the years of diſcretion, be received at the communion, and inſtructed to communicate worthily; and they ſhall further take care, that ſuch as have been admitted to the communion do not neglect opportunities of receiving it.

§ 22.

When among the pupils there are found excellent geniuſes, and when, in the examination of the ſchools, they ſhall give ground to hope that they will ſome time make conſiderable progreſs in learning, our will is, that the guardians do not in any way diſſuade them from applying to it, but that, on the contrary, they encourage them, and furniſh the expenſe, if their fortune

fortune be ſufficient: but if it be not ſufficient, they ſhall apply to the magiſtrate to get his advice and orders what they are to do.

When theſe orphans have attained to the proper age for going to the univerſities, they ſhall be ſent to ſuch as are ſettled in our dominions, and recommended to the profeſſors, whom we ordain by theſe preſents, to take particular care of their behaviour. Guardians alſo ſhall be obliged, as much as poſſible, to take care, that, under pretext of ſtudy, they do not give up themſelves to idleneſs, and accuſtom themſelves to an irregular courſe of life.

§ 23.

But pupils who have neither the talents nor fortune requiſite for applying to learning, ſhall be educated ſo as they may follow other profeſſions, according as their ſtation or means ſhall require; or elſe they ſhall be ſet to ſervice, in conformity to the edict of our grandfather of glorious memory, publiſhed the 25th of Auguſt 1708, and printed in the appendix to this book, N. II.

§ 24.

As to female orphans, our will is alſo, that the guardians educate them in piety and virtue; that they cauſe them to be inſtructed in the Chriſtian religion, and employed according to their ſtation, in houſehold affairs, and other works ſuitable and becoming girls.

ART.

ART. II.

Of the adminiſtration of the pupil's effects.

§ 25.

IT cannot be ſaid that proviſion has been made for the pupil's ſafety, if the guardian be not alſo careful to preſerve his effects, and to adminiſter them pro-

§ 26.

[illegible]ually happens that when there are ſeveral [illegible]ns named for the ſame perſon, they mutually [illegible]nd for the adminiſtration, we have been pleaſed [illegible]oviate ſuch diſputes, by enacting and ordaining [illegible]nce for all, that for the future,

1.) If all the guardians want to adminiſter together, they may do ſo, provided they give jointly ſufficient ſurety, becauſe they are bound *in ſolidum*, that is, all together and one for all.

2.) That they may in this caſe divide the adminiſtration among themſelves; but the ſurety ſhall, in the ſame manner, be brought by all the guardians, who ſhall, notwithſtanding this diviſion, be bound *in ſolidum* for each other.

3.) But if one of them do not think proper to adminiſter with the others, and to be anſwerable for them, nor to divide the adminiſtration, he may be admitted to adminiſter alone, on offering ſufficient ſurety; and after the judge has fully and deliberately examined all circumſtances, he ſhall have authority to deprive the other guardians of the adminiſtration if he think it convenient. If there be ſeveral who offer to adminiſter alone, and to give ſurety, the moſt capable and moſt ſolvent, both of himſelf and by his ſurety, ſhall be preferred.

4.) That the judge may, at the requeſt of the guardians, or by virtue of his own office, divide their adminiſtration, whether they be teſtamentary guardians, or ſuch as are called to the guardianſhip by proximity of blood; but, in this caſe of an adminiſtration divided by the judge, no one ſhall be bound for the reſt.

5.) That the other guardians, nevertheleſs, in quality of honoraries, ſhall watch over the conduct of him who ſhall be appointed to the adminiſtration, and if they find any thing blameable in him, ſhall accuſe him as ſuſpected.

6.) That one who is named as an honorary guardian, whether by a will, or by the judge, ſhall not be bound to give oath, nor ſurety, nor to make inventory, nor to intermeddle with the adminiſtration, but he ſhall be obliged to get himſelf confirmed, and to take care, as has been juſt ſaid, of the conduct of the guardian intruſted with the adminiſtration. Honorary guardians may alſo aſſiſt at the annual giving in of the accounts, and give their objections on that head; for which purpoſe the court of pupils ſhall cauſe them to be cited as often as there ſhall be accounts of their guardianſhips given in.

§ 27.

On one ſide the guardian intruſted with the adminiſtration may, without the concurrence of his pupil, contract, ſettle all his affairs, and diſpoſe of his effects; and on the other, the pupil has a tacit hypothec or mortgage on all the guardian's effects.

But as the guardian is appointed only with a view to defend his pupil, and conſequently for his advantage and benefit, it is plain, that the liberty which he has of diſpoſing of his effects ought to be circumſcribed within proper bounds.

§ 28.

§ 28.

Whence it follows, that the guardian is obliged to keep the houſes and other buildings in good repair, and to manage the lands ſo as that they may not turn waſte; as alſo to ſet them in leaſe, if he find that it is for the intereſt of the pupil that they be ſo, and to be careful that the farmers or leaſeholders do not ſuffer them to fall to decay, but that they take care to provide for their preſervation.

[redacted] the produce of the lands, whether conſiſting in [redacted]r in fruits, beer, hay, ſtraw, *&c.* ſhall be [redacted]xactly by the guardian from year to year, as [redacted]t he ſhall have expended in melioration and [redacted]tion of the ſubjects, or for the maintenance of [redacted] pupil himſelf, that, after the expiration of the [redacted]r, he may give a faithful account of them to the pupil.

The guardian is bound to ſell timeouſly and without delay, and to turn into money, for the pupil's behoof, the moveables which may periſh and be loſt, or which it is advantageous to ſell off, as cloaths, and unneceſſary and ſuperfluous utenſils, grain, beer, fruits, *&c.* provided always that he ſhall keep a particular note of what he ſhall ſell, and of the money which he ſhall draw for it.

All the ready money ſhall be laid out on ſecurity, and at intereſt, as it ſhall come into his hands. If there be no proper opportunities of laying it out on ſecurity, the guardian ſhall cauſe the ſum which he has in hand to be advertiſed in the gazette; and ſhall acquaint the judge at the ſame time, that the money may in the mean while be ſealed by him, and reſtored to the guardian, or elſe depoſited in court.

The judge himſelf ſhall take care to get it laid out, and ſhall cauſe it to be put in the gazette, that there are capital ſums belonging to pupils, to be lent at five *per cent.* intereſt, even though there were but a

ſum of one hundred rix-dollars; which he ſhall alſo cauſe to be publiſhed in a bill paſted on the town-houſe, or on the court-houſe, without exacting any thing for the advertiſement.

If after public advertiſement for ſix months following, and for at leaſt once a-month, that there are ſums belonging to pupils to be lent out at five *per cent.* and if no body offer to take them at that rate, the guardian may lend them at four and one half, and even at four *per cent.* but only for one year, and continuing to cauſe it to be inſerted every month in the gazette, that, after the expiration of the year, ſums will be lent at five *per cent.*

If any negligence on this head can be imputed to the guardian, or to the judge, and if it be through their fault that the ſums are not lent, they ſhall be bound for the loſs which the pupil ſhall ſuffer.

§ 29.

Guardians ſhall take care that their pupils have ſecurities for what is due to them, and, for this purpoſe, ſhall attentively examine whether the obligations or bonds be good and valid.

If the ſums be not well ſecured, they ſhall be bound legally to demand them; and the debtor cannot be excuſed from making payment of them to the guardian.

But if he wants to repay them with ſafety, he muſt do it judicially, and upon an acquittance of the judge. This ſhall alſo be obſerved when the debtor does not incline any longer to keep the ſum, and ſhall of himſelf offer to repay it.

In caſe, by the guardian's negligence, it be more difficult to get payment of the debts due to the pupil, or if it be even impoſſible to recover them, he ſhall be bound, in the firſt caſe, to proſecute for the repayment at his own expenſe, and, in the ſecond,

to

to pay the debt to the pupil out of his own money, reſerving to himſelf recourſe againſt the debtor.

Nothing can be imputed to the guardian, if, at the time that he took upon himſelf the guardianſhip, or that he laid out the ſums, or when he intented the action, the debtor had ſufficient funds; ſuppoſing that, contrary to all expectation, his condition afterward became worſe. For it is ſufficient if the guardian have neglected nothing, ſince the debtor's affairs be[illegible] to be out of order.

§ 30.

[illegible] advertiſement ſhall be made, for ſix follow[illegible]onths, in the gazette, that there is a ſum be[illegible]ging to pupils to be lent, without any one offering [illegible]borrow it, and when the guardian wants himſelf to improve the ſum, and pay the uſual intereſt for it, he muſt apply for this to the judge, who may allow him to do ſo, ſuppoſing circumſtances to anſwer, and that he give ſufficient ſecurity.

§ 31.

If there be debts due by the pupil, the guardian ſhall take care to diſcharge them as ſoon as poſſible, beginning always with ſuch as are moſt burdenſome.

§ 32.

When a guardian ſhall have an opportunity of employing with ſafety his pupil's money in the purchaſe of immoveable and profitable ſubjects, he ſhall not ſuffer the occaſion to ſlip; but he muſt previouſly give notice of it to the judge.

§ 33.

The adminiſtration of guardians likewiſe includes the power of conducting a law-ſuit, to the pupil's advantage, of intenting actions, of appointing an advocate, of appealing from ſentences, &c. Indeed a guardian,

guardian, who ſhould neglect any of theſe things, would be anſwerable for the loſs which might thereby happen to his pupil.

If, nevertheleſs, guardians intent or proſecute law-ſuits maliciouſly, and without ſufficient foundation, they ſhall be anſwerable for any loſs, and ſhall pay the charges of them.

Guardians who have not knowledge of the laws, ſhall be obliged, before beginning a law-ſuit, to conſult experienced advocates; which they ſhall al[illegible] when the caſe is doubtful; and any advoc[illegible] contrary to the deeds, or contrary to the n[illegible] nor of the laws, ſhall adviſe a guardian to [illegible] a ſuit, or ſhall take upon himſelf the proſecu[illegible] it, ſhall be made anſwerable for it. Moreover guardian ſhall have a right to tranſact doubtful affa[illegible] till he have previouſly reported it to the judge, with all the circumſtances, in order to have his approbation.

§ 34.

All guardians, in the exerciſe of their office, are bound to be anſwerable for what are called ſlight faults *; by which is underſtood, that they are obliged to beſtow the ſame pains as every good maſter of a family does in his own proper affairs.

But a guardian who offers himſelf to adminiſter the guardianſhip, or who gives money to be admitted to it, or who gets others excluded from the adminiſtration, ſhall be anſwerable for the ſlighteſt fault †; by which is underſtood, that he ſhall be obliged to give to the exerciſe of the guardianſhip all the attention and care which the moſt diligent and moſt prudent maſters of families are wont to employ in their own proper affairs. This ſhall be treated at length below, in the title concerning the action of a pupil againſt his guardian ‡, tit. IX. art. I.

* Culpam levem. † Culpam leviſſimam.
‡ De actione tutelæ directa.

§ 35.

§ 35.

Honorary guardians, who, having nothing to adminiſter, are only obliged to overſee the conduct of the perſon who is charged with the adminiſtration, are anſwerable only for their own fraud, and for the faults which are called palpable *. They are conſequently anſwerable only, when, on ſet purpoſe, and from malice or unpardonable negligence, they do not inform the judge with the male-adminiſtration of the guardian intruſted with the management.

§ 36.

The duty of a guardian is alſo to put to ſale all the pupil's periſhable moveables, and which bring no income; but not to alienate his immoveable ſubjects and landed eſtate.

§ 37.

Wherefore we expreſsly declare, that no guardian ſhall have authority to ſell, to engage, or ſubject to burdens, a land-eſtate or immoveable ſubject, ſuch as a houſe, court, garden, lands in tillage, meadows, *&c.* however inconſiderable the immoveable ſubject may be; comprehending alſo, under this name, hereditary rights, ſervitudes in town and country, and other things which are compared to immoveables, as alſo valuable furniture, jewels, and ſuch like.

§ 38.

Our will is, that this prohibition be obſerved even by the father, who is the lawful adminiſtrator of his children's fortune. See above, tit. IV. § 3. and § 7. Nevertheleſs, as it often happens that the ſituation of the pupil, as well as of the immoveable ſubjects themſelves, is ſuch, that they muſt neceſſarily be alienated, our will is in theſe caſes, that the alienation

* Culpam latam.

be

be permitted, but only on the following conditions.

§ 39.

I. Our will is, that the cauſe of alienation be preſſing: ſuch as that of delivering a pupil from the proſecution of his creditor, who, wanting his payment, could obtain it only by the ſale of the immoveable ſubjects; eſpecially if it were very difficult to find money to borrow in order to ſatisfy him, or if it were too burthenſome for the pupil to pay intereſt. Another juſt cauſe of alienation would alſo be, if it were neceſſary to ſettle his ſiſters portions, the donation on account of the nuptials, the dowery, *&c.*; as alſo, if the pupil's immoveable effects muſt be alienated, in order to afford him an equipage, a learned education, expenſe of travelling, *&c.* This alienation would alſo be neceſſary, if the immoveable ſubjects coſt more to ſupport them than they bring; eſpecially if the pupil, being ſtill very young, cannot conſequently, for a long time, take upon himſelf the care and adminiſtration of them: likewiſe, if the ſubjects be periſhable, or if they be jewels, ſilver-plate, *&c.* which bring no income.

It will alſo be a guardian's duty deliberately to conſider, whether the time be favourable for the alienation, and if it would not be advantageous for the pupil to wait for a better opportunity, and, in the mean time, to give the eſtate by way of mutual exchange, or to ſell it with a power of redemption.

§ 40.

II. Our will is, that the alienation be not made till the judge take cogniſance of it, and examine not only whether it be advantageous for the pupil, but alſo whether it be neceſſary. It would then be ſufficient, that, by the alienation of the eſtate, a guardian ſhould increaſe his pupil's income, but the judge muſt alſo be

be certified of the pupil's fortune, in order to know if he can live without that, and without contracting debts.

For this purpoſe, the guardian ſhall produce to the judge the inventory of the effects, with the laſt accounts of his adminiſtration; and, if the judge thinks proper to hear the agnats or neareſt relations upon it, he ſhall cauſe them to be cited for that purpoſe.

But if the father, in his will, had ordered, purely and ſimply, the alienation of immoveable ſubjects, it ſhall not be neceſſary to make any examination, and ſhall be ſufficient, if the eſtate be put to public ſale, according to the requiſite formalities.

§ 41.

III. Our will is, that the judge, after having made the examination juſt mentioned, and having heard the near relations upon it, give a decree or permiſſion to alienate *. And, in this decree, ſhall not only be enumerated the reaſons ariſing from the advantage that accrues to the pupil, but alſo thoſe which ſhow the neceſſity of the alienation.

Moreover, it muſt be obſerved, that the examination and decree juſt mentioned, may be demanded both from the judge within whoſe juriſdiction the pupil has his reſidence, and of him where the immoveable ſubject is ſituated.

If the guardian proceed to the alienation, without the cognizance of the judge, and without his having given a decree or permiſſion to alienate, the alienation ſhall not only be null, and of no effect; but, beſides that the guardian ſhall be anſwerable to the purchaſer for all damages and intereſt, if he be obliged to reſtore the purchaſe.

* Decretum de alienando.

§ 42.

IV. Our will is, that the immoveable ſubject or land-eſtate be advertiſed, and publicly auctioned. Which thing ſhall be obſerved, even though any one ſhould make a conſiderable offer, on condition that the eſtate ſhall not be advertiſed: for the purchaſer could not make the acquiſition with ſafety, if the eſtate were not auctioned in form.

§ 43.

If one of the conditions requiſite for the alienation of an immoveable ſubject, or of a land-eſtate, belonging to a pupil, be wanting, it ſhall be null, and of no effect, with reſpect to him, but not with reſpect to the purchaſer. And it ſhall not be neceſſary that the pupil demand to be reſtored to his full right againſt ſuch an alienation, but he may redemand the land-eſtate, with all the fruits received, or to be received, becauſe the poſſeſſor has no lawful title. The pupil ſhall not even be bound to reimburſe the price to him, but in as far as he has become richer by it, and it has been employed to his advantage.

If the land-eſtate be made worſe, he may eſtimate the damage by taking the oath which is called *in litem*, on which proviſion the ſum on which he gives oath, ſhall be taken from the cleareſt of the purchaſer's effects, or of the guardian's, or even of the father's, who adminiſters his ſon's effects. See above, tit. IV. § 3. and 4.

§ 44.

This rule, nevertheleſs, admits of ſome exceptions; and the alienation of a land-eſtate, belonging to a pupil, ſubſiſts in the following caſes, although all the formalities mentioned in the preceding articles have not been obſerved.

1.) When the pupil's father, by his will, has ordered the alienation of the land-eſtate:

2.) When

2.) When being a land-eſtate, on which another had a right of redemption *, the guardian reſtores it at the expiration of the time agreed.

3.) When, among ſeveral coheirs, he who is of age demands a diviſion of the ſucceſſion.

4.) When the pupil becomes the guardian's heir.

5.) When the pupil, after coming to age, ratifies the alienation.

6.) Or when he ſuffers four years, after he is of age, to elapſe without making any objections; whether he have any knowledge of the ſale or not: for it depends ſolely on himſelf to be informed, by conſulting the inventory and the accounts of the guardianſhip.

7.) But as to recourſe againſt the guardian, it takes place for thirty years.

If the poſſeſſor affirm that all the requiſite formalities were obſerved, and the pupil deny it, the proof lies on the poſſeſſor.

§ 45.

But if the pupil, not diſowning that the requiſite ſolemnities were obſerved, pretend nevertheleſs, that the cauſes of alienation alleged by the guardian, were falſe, or that he was wronged by the ſale, the contract of ſale would ſubſiſt, unleſs he prove what he advances, and conſequently obtain an entire reſtitution of his rights; which he may demand within four years, reckoning after the time he became of age. After the expiration of four years, he ſhall have no longer any action againſt the poſſeſſor, even though he had heard nothing of the ſale after he became of age.

The recourſe, however, againſt the guardian, who alleged falſe cauſes of alienation, or who ſold the eſtate at too low a price, remains reſerved for him for thirty years.

* Jus reluendi.

§ 46.

No guardian, were he even an honorary one, can purchaſe, either by himſelf or by others, the leaſt part of his pupil's effects, moveable or immoveable, ſuppoſing even the other guardians had conſented to it.

1.) Nevertheleſs, the caſe muſt be excepted, when, being to put to ſale the moveable and periſhable effects, and the judge, in conformity to the preſcription of the Frederician Code, is to put them to public ſale to the higheſt offerer, and laſt bidder, no body preſents himſelf to purchaſe them. For then it would be lawful for the guardian to make an acquiſition of them, with the conſent of the other guardians, if there were more, or even of the judge.

If a guardian, in a ſale of moveable effects, bid above a ſtranger, and he offers to give what the guardian offered, the ſtranger ſhall be preferred.

2.) If it be an immoveable ſubject, which is auctioned from neceſſity, or in a competition of creditors, the guardian ſhall not be allowed to make any offer, or to out-bid. Nevertheleſs, when, after the laſt bidder, it is ſeen that no other perſon offers to bid, the guardian may declare himſelf if he wants to give more; and if he who bade laſt will not give as much as the guardian, it ſhall be adjudged to this laſt; provided always that he pay ready money, and depoſit the price in court.

3.) But the guardian who, except in the caſes mentioned, ſhall buy his pupil's effects, ſhall be bound to pay him the double of the price.

§ 47.

Guardianſhip being a public burden, is to be accepted without requiring any payment for it: and indeed we promiſe ourſelves, from all perſons who are in a creditable ſtation, and whom God has bleſſed in their

their means, that they will take upon them this burden, from a principle of charity and Chriſtianity; ſo much the rather, that they may promiſe themſelves, in their turn, that if they leave at their death children in nonage, the ſame charity will be exerciſed toward them.

Nevertheleſs, as it muſt be allowed, that, on the one ſide there is in the adminiſtration of guardianſhips much trouble, and that a guardian is anſwerable for many things, and that, on the other, it is for the advantage of pupils, that for a ſmall recompenſe their effects be put in ſafety, and preſerved by a good adminiſtration, we conſent that a recompenſe be ſettled for guardians who demand it.

This recompenſe ſhall be determined at every giving up of the accounts, in proportion to the trouble, and to the pupil's effects; with this reſtriction, that if the ſtate of his effects be not ſufficient for his maintenance, no recompenſe ſhall be allowed to the guardian.

ART. III.

Of giving up the accounts of the guardianſhip.

§ 48.

A Guardian, and even a father who has adminiſtered his ſon's fortune, is bound to give an account of his adminiſtration every year, reckoning from the day he was confirmed guardian, according to what is preſcribed in the form printed in the appendix to this book, N. III.

As to the method of giving in theſe accounts when there are ſeveral guardians, it ſhall be treated below in § 51.

§ 49.

A guardian is ſo indiſpenſably bound to give in his accounts,

accounts, that even though the father, or one who had left a legacy to the pupil, ſhould declare by his will, that he does not intend they ſhould be given in, he ſhall nevertheleſs be obliged to do it once a-year, as well as other guardians; and even though the children were prohibited to exact it, on pain of being reduced to their legitim, no regard ſhall be had to ſuch a ſettlement, becauſe the judge is obliged, in virtue of his office, to cauſe the accounts to be given in.

§ 50.

But when the teſtator has made ſuch a prohibition, with a view to hinder the public from being informed of the pupils means, or when it is advantageous for them that they be not generally known, the judges and other perſons intruſted with the pupil's affairs, ſhall be bound to take care, in virtue of the oath which they have taken in judgment, that both the inventory and the accounts, and all the acts of the guardianſhip, be carefully ſealed and kept, both before and after the giving in of the accounts.

§ 51.

The guardian ſhall be bound, on pain of a fine of ten rix-dollars, which cannot be remitted, to preſent his accounts to the judge within ſix weeks after the year ſhall elapſe, and without waiting till he be required ſo to do.

When ſeveral guardians adminiſter together, they ſhall bring in their accounts in common. This ſhall be obſerved even when they have, of their own authority, divided the adminiſtration among them. But if the adminiſtration were divided by the teſtator, or with the conſent of the judge, every one ſhall give in and preſent his own accounts in particular.

If the guardian do not ſend his accounts to the judge within the ſpace of ſix weeks, or do not demand

mand a time to be fixed for receiving them, the judge ſhall determine the time by virtue of his office, reſerving to himſelf to exact the fine incurred by the delinquent.

§ 52.

When the guardian is ſeized with any great diſtemper, or when wars or contagions happen, or when the guardian is prevented by other reaſons from giving in his accounts within the time preſcribed, and demands a delay to be granted him, we are pleaſed to conſent, that while the hinderance continues, the giving in of the accounts be ſuſpended: nevertheleſs, if the guardian have received great ſums, or if the delay give occaſion for any ſuſpicion againſt him, our will is, that the judge be obliged, by virtue of his office, to cauſe the deeds and particular memorials which the guardian has of his adminiſtration to be produced, that the ſtate of the effects may be ſeen, after which the balance ſhall be delivered to him or depoſited in court.

Moreover, we do not allow that even in the caſes enumerated, and on any pretext whatſoever, the giving in of the accounts be ſuſpended above two years: but our will is, that, at the expiration of the ſecond year, the accounts of both years be received at the ſame time.

§ 53.

When the guardianſhip is ſmall, and the guardian's reſidence very remote from the place of judicature, to ſave expenſes, the giving in of the accounts may be deferred till the ſecond year: nevertheleſs, the guardian ſhall not do ſo of his own head, but he ſhall ſend the yearly account to the judge; on which the judge, either by virtue of his office, or on requeſt of the guardian, ſhall order what he thinks neceſſary; and if there be any ready money, he ſhall uſe the precaution which has been juſt preſcribed.

§ 54.

§ 54.

The judge before whom the accounts are produced ſhall examine them very attentively, ſhall obſerve the faults, and, by virtue of his office, make the objections, that they may be anſwered by the guardian. He ſhall at the ſame time appoint a day to vouch the accounts, and to receive them.

The judge ſhall be allowed, if he think it neceſſary, to communicate the accounts to the pupil's neareſt relations; as alſo to require from the guardian the particular memorandums which he has kept concerning his adminiſtration, or the journal into which he poſted only the receipts, and daily expenſe concerning his pupil, it not being allowable for him to enter there the receipts and expenſes which regard his own proper affairs. But if the guardian refuſe to produce his memorandums, or his journal, he ſhall be ſet aſide as ſuſpected, and a new guardian ſhall be intitled to proſecute him, and to take againſt him, in name of the pupil, the oath called *in litem*.

If the guardian pretend that his memorandums or journals are loſt, he ſhall be bound to purge himſelf by oath, and to ſwear that he made ſuch particular memorandums, but that they are loſt, and he does not know where they are, nor is it by his fault, and far leſs has he conveyed them away with a bad intention.

Particular memorandums of that kind conſtitute proofs againſt the guardian, but not for him.

If the guardian cannot immediately vouch his accounts, by anſwering the objections in a ſatisfactory manner, and if conſequently he be condemned by the judge to make up what is wanting, he ſhall be at liberty to appeal from the ſentence; but if there be any reaſon to apprehend that he is not ſolvent, or that the pupil's fortune is in danger in his hands, the judge may oblige him to give ſufficient ſurety, or

to

to cauſe deliver to himſelf the thing in queſtion, before he can proſecute his appeal.

§ 55.

The accounts ſhall be received by the judge who has confirmed the guardian.

But if the judge, to ſave charges, or for other cauſes, as if the guardian were ſick, incline to intruſt one of the neighbourhood to ſee on the ſpot the guardian's particular memorandums, or even to receive his accounts, and to examine the amount of the balance in order to ſeal it, or even to take it in charge, the guardian ſhall comply with the judge's order, on pain of one hundred ducats of fine or impriſonment, by producing every thing honeſtly before the commiſſioner named, and by vouching his accounts before him.

If the guardian himſelf demand that his accounts be received on the ſpot, the judge ſhall conſider things deliberately, in order to take the ſhorteſt, the ſureſt, and leaſt expenſive method for the pupil.

§ 56.

It ſometimes happens that guardians apply immediately to us to get commiſſioners appointed to receive their accounts. Although we do not intend favourably to liſten to ſuch demands, nevertheleſs, when, for particular reaſons, we ſhall grant them, our will is, that the commiſſioner by us named, obſerve every thing injoined to the courts of juſtice, and of pupils, with reſpect to the giving in the guardian's accounts; and if it happen at the expiration of the guardianſhip, or of the curatory or truſteeſhip, that the pupil prove that the commiſſioner did not proceed carefully when he received the guardian's accounts, and that by his proceedings, he ſhall have been the occaſion of loſs to the pupil by his irregular proceedings, he ſhall be anſwerable for it to the pupil *in ſolidum*, or all together, and one for all with the guardians or curators.

§ 57.

We have already enumerated, tit. VI. art. II. § 28. in a circumſtantial manner, what is to be brought to account. As to the different heads or branches under which every article is to be placed, the form in the appendix to this book, N. III. may be conſulted.

§ 58.

When after giving in the accounts there is a balance, the judge ſhall only leave to the guardian what is neceſſary in order to carry on his adminiſtration, and ſhall ſeal up the ſurplus to be reſtored ſealed to the guardian, or to be depoſited in court, making public advertiſement, at the ſame time, in the gazette, that there are ſums belonging to pupils to be lent at five *per cent.*

§ 59.

Moreover, it is plain, that when the guardian delays to give in his accounts, and to deliver the balance, he ſhall be accountable for the intereſt, even though he may have cauſed to be advertiſed in the gazette the ſum which he has in hand.

§ 60.

We ſhall treat in title IX. art. I. § 6. of what is to be obſerved concerning the receiving the guardian's accounts at the expiration of his office.

TITLE VII.

Of the authority of a guardian, ſo far as it is to be interpoſed in the deeds which the pupil himſelf executes.

§ 1.

IT has been ſaid in the preceding title, § 27. that the guardian may act by himſelf in the pupil's affairs, and that ſo he may, provided he comply with what

what is prescribed to him, dispose of the pupil's effects without his consent.

Nevertheless there are certain deeds which the pupil himself may do validly, when he is past the age of infancy, and has the guardian's authority to them.

§ 2.

The guardian's authority in this case is then the consent which he gives to a deed executed by the pupil himself, in order thereby to supply what he wants in understanding and judgment. This, moreover, is understood, that if there be several guardians, they must all give their consent to the deed.

§ 3.

1.) But in order to authorise a pupil, it is requisite that it be really the administering guardian who does it. For honorary guardians, vice-guardians, sham-guardians, have no authority to assist pupils in the deeds which they execute.

2.) It must be a private deed, since it is past doubt that a judicial deed cannot be executed by a pupil without his guardian's authority.

In order to use this authority, it is also requisite,

3.) That the pupil be past the age of infancy, that is to say, that a boy be more than seven years old, and a girl more than six; because before that age children have absolutely no discernment, and cannot consequently make any transaction, even though they were impowered to do so by their guardian.

4.) It is also requisite that the guardian be present at the deed which the pupil wants to execute; for he cannot give his consent if he be absent, and the deed would be invalid, even though the guardian should afterward ratify it.

5.) He ought also to have a full knowledge of the pupil's deed and transaction,

6.) And to give his conſent purely and unconditionally,

7. And even immediately and in expreſs terms.

A guardian's authority differs then from the conſent of curators in this, that in order to render valid the deeds of minors, it is not neceſſary that the curator be preſent, and, beſides, he may alſo give his conſent conditionally and tacitly.

§ 4.

When a pupil executes a deed without his guardian's authority, it is by law null and of no effect.

A pupil then cannot alienate any thing whatſoever, nor be ſued on account of deeds executed without his guardian's authority.

He cannot even, without that authority, execute any deed as heir, even though the ſucceſſion were advantageous.

The rule which has been juſt eſtabliſhed, and which does not allow a pupil to be ſued for affairs tranſacted by himſelf alone, without the authority of his guardian, admits an exception in the two following caſes.

1.) When the pupil has been enriched to the prejudice of a third party, as if he had raiſed a ſum which was not due to him.

2.) And when a pupil, namely, a boy after ten years and an half, and a girl after her ninth year, has fraudulently occaſioned loſs to any one.

§ 5.

Though a pupil be not bound by the tranſactions which he hath made without his guardian's authority,

1. He who has tranſacted with a pupil, and who has, for example, promiſed him a preſent, or who has agreed with him on an exchange, or on a ſale, which is advantageous to him, is not the leſs engaged to him;

him; but for this the pupil muſt alſo fulfil his engagements.

2. And if the pupil have brought a ſurety or cautioner, he cannot pretend to diſengage himſelf, on pretext that the guardian's authority is not interpoſed; for he is bound, in virtue of the promiſe which he made as ſurety.

§ 6.

A guardian is not obliged to interpoſe his authority. Nevertheleſs, if the queſtion were concerning an agreement which might manifeſtly tend to the pupil's advantage, and the guardian would not give his conſent, he ſhall be made anſwerable for it. Beſides, the pupil, or his relations, or even ſtrangers, ſhall be at liberty to lay the caſe before the judge, who ſhall ſupply the guardian's authority, and ſhall conclude the affair if it be in effect advantageous for the pupil.

§ 7.

The guardian's authority and aſſiſtance are eſpecially neceſſary, when the pupil has affairs which are to be brought into court, whether to ſue any one, or to anſwer an action raiſed againſt himſelf. See § 3. n. 2.

If a pupil have no guardian, the judge ſhall name one for him by virtue of his office, even though the adverſe party ſhould not demand one to be appointed; and our will is, that nothing be decided in the affair till the guardian be appointed.

§ 8.

If a guardian himſelf have any buſineſs to ſettle with his pupil, it ſhall belong to the other guardians, if there be any, to give their authority for this to the pupil; and if there be none, a particular guardian ſhall be named to execute the deeds requiſite with the former guardian.

A guardian who ſhould make a purchaſe of a thing belonging to his pupil, without the authority of a particular

ticular guardian interpoſed, ſhall be bound, even though he had made the purchaſe indirectly, by the intervention of other perſons, not only to reſtore it, but to pay the double of the price to his pupil. This ſhall take place, even though they were goods publicly auctioned, becauſe a guardian ought to remove every ſuſpicion of intending to become maſter of his pupil's effects.

From this rule, nevertheleſs, muſt be excepted the caſes enumerated in the preceding title, art. II. § 46.

§ 9.

A pupil obtains the property, as well as the poſſeſſion of things, acquired by virtue of the agreements in which the guardian's authority is interpoſed. And it is not the guardian, but the pupil, who alone can be ſued, or intent an action on account of ſuch agreements. See the following title.

§ 10.

When a pupil finds himſelf wronged in an agreement to which the authority of his guardian was interpoſed, he is at liberty either to intent againſt him an action of guardianſhip, or to demand full reſtitution of his right againſt the contract. See the following title, § 6.

TITLE

TITLE VIII.

1. Of the rights which a pupil acquires by his guardian's deeds; 2. Of the action to which he has right againſt a third party, by his guardian's deeds; and, 3. Of the action granted to a third party, by virtue of this ſame deed againſt a pupil.

(Quando ex facto tutoris pupillus agere vel conveniri poſſit.)

§ 1.

IT is a general rule, that uſually a purchaſe cannot be made by the deed of a third party, nor taken for the foundation of an action againſt any other, far leſs can one be ſued for another's deed. Nevertheleſs this admits an exception, when a guardian ſues, or executes a deed in name of his pupil. Here three queſtions occur to be diſcuſſed.

1.) Whether a pupil can make acquiſitions by his guardian's deed, and when, in effect, he acquires any thing by that deed?

2. Whether, and how far, a pupil may intent an action againſt a third perſon, or be ſued by a third perſon, on account of his guardian's deed?

3.) Whether, and how far, a pupil and his guardian may ſue each other reciprocally?

§ 2.

1. As to the firſt queſtion, it is without doubt that a pupil obtains the poſſeſſion which a guardian acquires in his name;

And if a guardian buy any thing in his pupil's name, the pupil acquires the property of it by his guardian's contract.

§ 3.

§ 3.

On the contrary, if a guardian take poſſeſſion in his own proper and particular name, of a thing deſtined for his pupil, or if he buy the thing with his pupil's money, he ſhall indeed acquire the property of it: but the pupil ſhall, in due time, have his choice to redemand it with the fruits received, or to be received, by virtue of the advantageous action, or to demand his capital ſum with the intereſt, at twelve *per cent.*

§ 4.

II. In order to reſolve the ſecond queſtion, a diſtinction muſt be made, and it muſt be known whether the guardian only interpoſed his authority, to approve a deed executed by the pupil himſelf, or whether the guardian alone contracted in his pupil's name.

In the firſt caſe, the pupil himſelf may ſue, or be ſued, ſo far that the oath called *in litem* may even take place againſt him. See § 9. of the preceding title.

In the ſecond caſe, when a guardian alone contracts in name of his pupil, the guardian alone can ſue or be ſued. Nevertheleſs, whether he ſue, or be himſelf ſued, he acts only, in ſuch a caſe, by virtue of his charge, and in quality of a guardian; ſo that the action of a thing determined * cannot be intented againſt him, the execution being to paſs not on the guardian's effects, but on thoſe of the pupil.

§ 5.

Thence it evidently follows, that when the guardianſhip is ended, it is not the buſineſs of the guardian, but of the pupil, and his curators, to intent an action. Thence, in like manner, it follows, that the

* *Actio judicati.*

guardian

guardian can no longer be ſued, and that any action is to be intented againſt the pupil and his curator.

The following caſes muſt be excepted, in which the guardian continues engaged, though the guardianſhip be ended.

1.) If the guardian have committed a fraud, by contracting in the pupil's name, and have deceived any one with whom he entered into contract. But if the pupil have profited of the fraud, (a circumſtance which muſt be proved by him who advances it), he may be ſued ſo far as he has been enriched thereby.

2.) If the guardian have declared himſelf ſurety for the ſecurity of the perſon with whom he hath contracted, and if, after the expiration of the guardianſhip, the pupil get the contract annulled, or be not in a condition to perform what was promiſed.

3.) If the guardian have contracted in his own name, and uſed for this purpoſe his pupil's money, he ſhall be bound, after the expiration of his guardianſhip, to reimburſe his pupil in ready money, reſerving to himſelf recourſe againſt the debtor. And if he borrowed money in his own name, he ſhall be ſued himſelf, after the expiration of the guardianſhip, though the money were diſburſed for the pupil's advantage.

Nevertheleſs, both the creditor and guardian have a right, in caſe the pupil be enriched thereby, to ſue him as far as the affair turned to his profit*; but both are bound to prove, that the money was really employed to his advantage.

If the guardian have indeed contracted in his own name, by binding for himſelf and his heirs, but have, nevertheleſs, mentioned in the obligation his office of guardian, the pupil himſelf muſt be ſued, when the guardianſhip ſhall be ended.

* De in rem verſo.

§ 6.

If the pupil think himſelf wronged by his guardian's deed, and has a view of being able to prove it, he ſhall have the choice, either to demand reſtitution to his full right againſt the third party, or to take his recourſe againſt the guartlian. See tit. VII. § 10.

§ 7.

As to the third queſtion, it is to be treated in the following title.

TITLE IX.

Of the actions which pupils may raiſe againſt their guardians, their heirs, and ſureties, as alſo againſt the magiſtrates and courts of juſtice, intruſted with the care of appointing guardians; and of thoſe which guardians may reciprocally intent againſt their pupils.

§ 1.

ON account of the adminiſtration of a guardianſhip,

1.) The pupil has an action againſt his guardian, in order to oblige him to give in an exact account of his management, and to repair all the loſs which he may have occaſioned; and this action is called a direct action of guardianſhip *. See art. I.

2.) On the other ſide, a guardian has a right to redemand all that he has advanced for his pupil's advantage, and all that is due to him by virtue of his adminiſtration: this he may obtain by means of a contrary action of guardianſhip †. See art. II.

3.) A pupil has right to an action againſt any perſon, who, not being legally appointed his guardian, has,

* Actio directa tutelæ. † Actione tutelæ contrariâ.

has, nevertheleſs, *bona fide* adminiſtered the office. This action is called *actio protutelæ*. See art. III.

4.) A pupil has alſo right to an action againſt any one who falſely and fraudulently intended to paſs for his guardian, and who, for this reaſon, is much more accountable than a lawful guardian. This action is called *actio quod falſo tutore auctore geſtum eſt*. See art. IV.

5.) He has alſo right to an action againſt his guardian's heirs, when they are bound for their predeceſſor's deeds. This action is called *actio de heredibus tutorum conveniendis*. See art. V.

6.) Againſt the ſureties of guardians, and againſt ſuch as have recommended guardians, as being ſolvent, and fit for their office. This action is called *actio de fidejuſſoribus et nominatoribus*. See art. VI.

Of all theſe different actions we ſhall treat in their order.

ART. I.

Of the direct action of guardianſhip, which a pupil may raiſe againſt his guardian.

§ 2.

PUpils and their heirs have a right againſt their guardian who has adminiſtered the office, and, after it is ended, to a direct action of guardianſhip; in virtue of which the guardian is bound to give an account of his adminiſtration, and to repair all the loſs occaſioned by his fault and negligence.

§ 3.

This action is founded on natural equity, becauſe it would not be juſt that one who is intruſted, by the authority of a judge, with another's effects, ſhould

be enriched at the proprietor's expenſe, or cauſe any loſs to him by his neglect.

§ 4.

Not the pupil only has a right to this action, under the direction of his curator, but his heirs alſo have a right to it.

§ 5.

This action takes place againſt the guardian who has adminiſtered the pupil's effects.

I. If ſeveral guardians named in the father's will, or called to the office by proximity of kindred, have adminiſtered jointly, they ſhall alſo jointly give in the accounts of their guardianſhip, and ſhall, all and each of them, be anſwerable for the whole loſs occaſioned to the pupil, without having it in their power to allege, in their own favour, the benefit of order, nor that of diviſion. The perſon who ſhall pay can only take his recourſe againſt the other guardians, and proſecute them at law ſeparately.

II. The ſame ſhall be the caſe when guardians, without proper authority, divide the adminiſtration. Nevertheleſs, in both caſes, an exception muſt be made in behalf of a guardian, who may have accuſed another as ſuſpected. For the firſt ſhall not be anſwerable for the loſs which the laſt may have occaſioned by his fault, *N. B.* if the loſs happened after the accuſation was intented.

III. If one of the guardians have offered to adminiſter alone, and to give ſurety, and was alone admitted to the adminiſtration, an action of guardianſhip can only be intented againſt him ſingly. Conſequently it is he alone who is accountable, and who is anſwerable for all the loſs.

The other guardians ſhall then, in ſuch a caſe, be only regarded as honorary guardians, of whom we ſhall diſcourſe afterward.

IV. If

IV. If the judge approve the diviſion of the adminiſtration, or order it even by virtue of his office, each guardian ſhall give in particular accounts, and ſhall only be anſwerable for what was intruſted to his own adminiſtration.

Moreover, as in this caſe, every guardian is to be regarded, with reſpect to the joint guardians, on the footing of an honorary guardian, each is bound to watch over the adminiſtration of the others, and, if there be reaſon, to accuſe them as ſuſpected. A guardian who ſhould neglect to do ſo, might be proſecuted in an action of guardianſhip, which, in this caſe, takes place againſt honorary guardians.

§ 6.

When the guardianſhip is ended, the guardian may then, by this action, be obliged to give in the accounts of his adminiſtration, in ſo far as they have not yet been fully given in; and our will is, that the proceedings in them be as follows:

I. Every guardian teſtamentary, legal, or named by the judge, (as alſo the father in his quality of legal adminiſtrator of the effects of his children in nonage), ſhall be bound, on pain of a fine of ten to one hundred rix-dollars, to produce to the judge who has confirmed him guardian, within the ſpace of ſix weeks, reckoning after the guardianſhip is ended, both the inventory and final account, which ſhall be accompanied with a faithful extract of all the accounts given in by him during his adminiſtration, and with an exact liſt of the debts due to, or by his pupil. He ſhall demand, at the ſame time, that the judge acquaint the pupil and his curator with this, and that a day be appointed to receive his accounts.

II. The guardian ſhall be bound to deliver to the pupil and his curator, within the ſpace of two months after the pupil has attained the age of puberty, all the ready

ready money and grain which ſhall be in kind, as alſo all the other effects which belong to him, whether moveable or immoveable.

And after having ſhewn that he has delivered all, he ſhall take a judicial acquittance.

III. On the other ſide, the minor and his curator ſhall be obliged immediately to make good to the guardian all the advances which he ſhall prove to have been employed on the minor's wants, and to have turned to his advantage.

IV. If, among the guardian's claims, there be any that are doubtful, they ſhall be referred to the examination of the judge. And the curator, in the mean time, ſhall take care, according as circumſtances ſhall require, to cauſe the ſum, or thing conteſted, to be depoſited, or elſe to cauſe the guardian to give ſurety.

As to the annual giving in of the accounts of the guardianſhip, it has already been treated of above, tit. VI. art. III. § 48. and following.

§ 7.

In order to judge when any loſs has happened to a pupil by his guardian's adminiſtration, whether he be bound for the fault that he has committed, it muſt be known what diligence he ought to have uſed in the exerciſe of his office.

Uſually a guardian is obliged to be anſwerable for a fault which is called *ſlight*, being bound to adminiſter his office with that care and exactneſs, which every maſter of a family who is diligent and ſavings employs in the management of his own affairs. For example, if a guardian, leaving with the purchaſer of his pupil's effects the price of immoveable ſubjects ſold to him, neglect to cauſe the debt to be regiſtered in the record of mortgages, and, by that negligence, poſterior creditors were preferred to the

pupil,

pupil, the guardian would be made anſwerable for it.

If a guardian offer himſelf to adminiſter a guardianſhip, which he would not have been conſtrained to accept according to the laws, he ſhall be bound for a very ſlight fault *: that is to ſay, the ſame exactneſs and diligence is requiſite in him, as the moſt prudent and moſt perfect œconomiſt is wont to employ in the management of his houſehold.

Whence it follows, that a guardian is ſtill more anſwerable for the loſs which he has occaſioned by any great fault of his own †; that is to ſay, when he was not as careful and attentive as maſters of families who are not of the moſt careful, nevertheleſs are uſed to be in their own proper affairs; for example, if he neglect timeouſly to demand, and bring in the ſums which manifeſtly appear not to be well ſecured; or if, without informing himſelf of a borrower's ſituation, he ſhould lend him money on his bill, without having ſufficient ſecurity.

But a guardian is chiefly to be made anſwerable for his frauds; that is to ſay, he is obliged to indemnify his pupil for every thing he has maliciouſly done to his prejudice, and to be anſwerable for all the damages and intereſt which the minor and his curator can prove, by the oath called *in litem*.

As to mere chances, the guardian ſhall not be made anſwerable for them; neither can he be obliged to anſwer for the deeds of his predeceſſor in the guardianſhip.

§ 8.

If a pupil, when the guardianſhip is ended, find that he is wronged in the giving in of the yearly accounts, as if they were evidently falſe, or if the guardian had not ſtated every thing in them juſtly; for

* Culpa leviſſima. † Culpa lata.

example,

example, if he had placed to account great ſums for a journey which was not made for the pupil's benefit, or, at leaſt, was not taken ſolely on his account; if the pupil have not received ſuch a maintenance as is ſtated, and had no governor or ſervant, or at leaſt, had them not for himſelf alone, *&c.*: in all theſe caſes the pupil or his curator may intent an action of guardianſhip againſt his guardian; though the guardian may have already got a judicial diſcharge, they may prove the defects of his accounts, or refer them to his oath. They are even at liberty firſt of all to blame the judge, and to ſue him for having allowed all the articles of the accounts, without objecting againſt them.

§ 9.

Beſide an action of guardianſhip, pupils are intitled alſo to other actions againſt their guardians, namely,

1.) An action of deceit or fraud *, when a guardian has been the occaſion of loſs to the pupil deliberately and maliciouſly. In this caſe he is bound to pay the double of the loſs, and the curator, and minor himſelf may get it eſtimated by the oath called *in litem.*

2.) An action of robbery †, when he has carried away purpoſely any of the effects belonging to the pupil.

3.) An action called *actio de rationibus diſtrahendis*, when he has received any thing for the pupil, and has purpoſely not paſſed it to account; he ſhall alſo in this caſe pay the double of the price of the thing.

Obſerve, that in the two caſes mentioned, the price of the thing is included in the double: if then the pupil have already got the thing, or its value, by an action of guardianſhip, he could not by the two preceding actions ſtill demand the double, but only the ſingle value, that is to ſay, as much as he has already

* Actionem de dolo. † Actionem furti.

received,

received, and the value of the thing ſhall be given him in puniſhment for the guardian's diſhoneſty.

4.) An action on the law *Aquilia*, which takes place when the guardian has done a prejudice to his pupil, and when the damage was occaſioned by the guardian's own deed, or by his orders, upon any of the pupil's effects, which the lawyers call *corpore vel in corpus*.

5.) An action of abuſe or treſpaſs *, when the guardian has done any thing which tends to the pupil's ſhame.

6.) An action of hypothec or mortgage †, becauſe the pupil having a tacit hypothec or mortgage on the guardian's effects, he may ſue not only the guardian, but alſo all the poſſeſſors of thoſe effects, who have not a right preferable to his own.

§ 10.

The pupil's heirs have equally a right as himſelf to intent thoſe actions againſt the guardian and his heirs. It muſt only be obſerved, that the heirs of guardians are not obliged to pay double, but only ſingle, unleſs, the ſuit being begun in the guardian's lifetime, the cauſe were already debated before his deceaſe.

§ 11.

If a guardian, after finiſhing the adminiſtration of his office, ſhould alſo take upon him that of curator, all thoſe actions will only take place after the expiration of the curatory, or his office of curator.

* Actionem injuriarum.
† Actionem hypothecariam.

ART. II.

Of the contrary action of guardianſhip, to which the guardian has right againſt his pupil.

(De actione tutelæ contraria.)

§ 12.

IT is moſt juſt, that a guardian who is a man of probity, and has faithfully adminiſtered his office, ſhould ſuffer no loſs by his adminiſtration; wherefore alſo the laws have allowed to him, as well as to his heirs, a contrary action of guardianſhip, in virtue of which he may, when his office is finiſhed, demand, both from the pupil and from his heirs, all that he has laid out of his own in the adminiſtration of his guardianſhip, and all that he wants on that account.

§ 13.

It is very evident that this action is founded on natural equity; it would indeed be the greateſt injuſtice if a pupil might be enriched at the expenſe of a man who has done him very eſſential and very important ſervices.

§ 14.

By this action a guardian may demand all that he has expended for his pupil's education, for his maintenance, *&c.* and, in general, all that he has expended of his own for his pupil's advantage, even though the meliorations were no longer in being, provided they were loſt without any fault of the guardian.

If the guardian had become ſurety for his pupil, he may, by this action, demand to be freed from his engagement; in the ſame way, if, as an advocate, he have drawn up the writings in his pupil's law-ſuits,

or

or have otherwiſe procured him any advantage, by a labour which is not annexed to the office of guardian, he may ſtate it to account.

§ 15.

But he cannot by this action demand his ſalary; the judge muſt, after being required to award it, determine it, by virtue of his office. It would be otherwiſe, if the teſtator in his will, or the judge on confirming the guardian, had ſettled the ſalary which he was to draw yearly; for in that caſe a contrary action of guardianſhip would take place.

§ 16.

Not only the ſum advanced by the guardian ſhall be reimburſed to him, but the intereſt alſo ſhall be made good, unleſs the pupil had himſelf ſums lying idle, and which might have been employed inſtead of the guardian's advances.

§ 17.

A guardian ſhall not expend more for his pupil than he has of incomes, even though the father had allotted by his will, for the pupil's maintenance, a ſum exceeding his incomes: nevertheleſs, if his incomes were not ſufficient to give him an education ſuitable to his ſtation, and if the guardian, or the mother acting as guardian, without marrying again, ſhould expend above the income for the pupil's manifeſt advantage, this expenſe ſhall be allowed them.

§ 18.

This action takes place againſt a pupil,

1.) Even though the guardian have been ſet aſide as ſuſpected,

2.) Though he have got a yearly ſalary,

3.) Or though the pupil had raiſed againſt him an action called *de rationibus diſtrahendis*, that is to ſay, even though he ſhould pretend that the guardian had

not ſtated every thing to account, unleſs he could prove it immediately, and in an evident manner.

§ 19.

A vice-guardian, and even a falſe guardian, may intent an action.

§ 20.

If a pupil owe any thing to his guardian for other cauſes than that of the adminiſtration of his office, he cannot ſue for payment of what is due to him by an action of guardianſhip, but he ſhall be obliged to raiſe an ordinary action.

§ 21.

Neither can a guardian raiſe this action till his office be ended. If, nevertheleſs, a guardian were named in order to execute a certain deed, when that deed is executed he may ſue his pupil.

ART. III.

Of the action againſt a vice-guardian, that is to ſay, againſt one who not being named guardian according to the laws, has nevertheleſs bona fide *adminiſtered the office.*

(*De protutore.*)

§ 22.

WHen a guardian who was not named either by the teſtator, or by the judge, nor is a near relation of the pupil, thinks nevertheleſs ſincerely that he is a relation, or was named guardian by will, he is named a vice-guardian.

One who knowing well that he is not a guardian, but who, with good intentions, and for the pupil's advantage,

vantage, adminiſters the office, ſhall alſo be regarded as a vice-guardian.

§ 23.

Vice-guardians differ from ſuch as do buſineſs for another, and who are called in law *negotiorum geſtores*, in this, that the latter are not engaged further than the affairs which they have managed, whereas the vice-guardian is anſwerable for every thing that concerns the adminiſtration of the guardianſhip.

§ 24.

A pupil is not bound by the deeds of his vice-guardian, and cannot be ſued for the contracts which he has executed: and even though the pupil have himſelf contracted with the authority of his vice-guardian, the contract would be null and of no effect as to the pupil, unleſs in theſe two caſes the pupil were enriched, as it is juſt then that he might be ſued ſo far as he is become richer.

But as to the perſon who has contracted with the pupil, and as to the ſurety brought by the latter, the contract is as valid as if a real guardian had interpoſed his authority to it.

§ 25.

A vice-guardian has the ſame engagements to perform as a real guardian, and ought to obſerve every thing preſcribed to this latter.

And as a vice-guardian takes upon him the adminiſtration of his own proper motion, he ſhall not only be obliged for a ſlight fault, but for a very ſlight one; that is to ſay, he ſhall be obliged to uſe in his adminiſtration all the diligence, which the moſt prudent maſter of a family is in uſe to employ in the management of his own affairs.

§ 26.

All the actions allowed to a pupil againſt a real guardian,

guardian, take place alſo againſt a vice-guardian. See art. I. above.

The action againſt a vice-guardian, which is called alſo by a particular name, to wit, *actio protutelæ*, may be raiſed even during the adminiſtration of the office, in which it differs from an action of guardianſhip, See above, § 6.

§ 27.

If one manage as guardian the affairs of a perſon already in the age of puberty, there would be no place for the action called *protutelæ*, but for that of buſineſs done *.

§ 28.

Uſually a vice-guardian may be ſued with regard to the adminiſtration of the whole guardianſhip, and may conſequently be made anſwerable for his neglects; ſee § 23. unleſs he have applied to the judge to get a guardian appointed in form, as ſoon as he intended not to continue the adminiſtration, or was informed that he was not guardian.

In this caſe he can only be ſued for affairs tranſacted during the time of his adminiſtration, and for ſuch as are connected with them, whether he have contracted in the pupil's name, or have only interpoſed his authority.

* Actio negotiorum geſtorum.

ART.

ART. IV.

Of such as falsely and fraudulently pass themselves for guardians.

(De falso tutore.)

§ 29.

IF any one fraudulently, and with a design to deceive a pupil, or any other, call himself a guardian, whether he contracts in the pupil's name, or interpose his authority to the deeds which the pupil himself executes, he is what is called a false guardian *.

§ 30.

That sort of people shall also be esteemed false guardians, even though they had got themselves confirmed, since, according to the laws, they cannot be guardians, and cannot become such without our consent, or without that of our courts of judicature. The same shall be the case with such as not having a right to interpose their authority, nevertheless do so; as if one who was appointed guardian for one single deed, or for the administration of the effects situated in another province, should contract in the pupil's name, or interpose his authority in affairs which do not hold of him.

§ 31.

All that a false guardian does is by law null, and of no effect. And indeed a pupil cannot sue any one, nor be sued himself, on account of what was contracted in his name by a false guardian, and of agreements which he himself executed with the authority of such a guardian.

* Falsus tutor.

§ 32.

§ 32.

Nevertheleſs a pupil has right to all the actions againſt a falſe guardian which he has againſt a true one. See above, art. I.

§ 33.

If one who has contracted fairly with a pupil and a falſe guardian ſuffers any loſs by them, he may raiſe againſt this fraudulent guardian the action called *in factum*, by virtue of which he can oblige him to repair all the damage which he has ſuffered by them, and which he may even eſtimate by the oath called *in litem*.

§ 34.

If it happen that ſeveral falſe guardians have contracted or interpoſed their authority, each ſhall be anſwerable for the whole loſs: and if one of them alone pay it, the others ſhall indeed thereby be freed from the proſecution of the pupil, but he who has paid, ſhall have his recourſe againſt them for his being reimburſed proportionally.

In caſe the authority of a real guardian be alſo interpoſed in the deed executed by the falſe guardians, or under their authority, the deed would be valid.

§ 35.

The action called *in factum* is alſo competent to the demander's heirs, againſt the heirs of the falſe guardian; becauſe it is reaſonable that the demander be indemnified out of his effects who dealt fraudulently with him; whence it follows, that he ought to have a right to proſecute the falſe guardian's heirs in order to obtain his indemnification.

§ 36.

A falſe guardian may alſo be puniſhed arbitrarily, and in a manner proportioned to the fraud committed by him.

§ 37.

§ 37.

Thirty years are allowed for intenting the action called *in factum*.

§ 38.

If it happen that a man ſuffer himſelf to be perſuaded that he is intruſted with the guardianſhip, and, in conſequence, interpoſe his authority to a pupil's agreements, the perſon who has contracted with him and the pupil, may, in order to obtain his indemnification, intent an action againſt the perſon by whom the pretended guardian was induced to think himſelf intruſted with the office; and this action is called *actio in factum utilis*.

§ 39.

If a perſon who contracts fairly with a falſe guardian loſe thereby any right, or neglect any precautions which he ought to have taken; for example, if one ſue a pupil to redemand a thing in which the perſon who contracted with the pupil has a right of property; or if, beſides, there were raiſed againſt the pupil any one of thoſe actions called *temporal*, and if, during the continuance of the proceſs, which at bottom is null, the actions come to be preſcribed, it would be reaſonable that he who contracted fairly with the falſe guardian, ſhould have all the rights mentioned againſt the preſcription; and our will is even, that it be not neceſſary for him to procure relief from it, as was requiſite by the Roman law.

But if the perſon who contracted with the falſe guardian knew that he was not a real guardian, and if in both the caſes mentioned the contractor have committed any neglect which might have made him loſe his right, he cannot get himſelf relieved from it, unleſs he be ſtill under age; in which caſe the contractor would be intitled, on account of the weakneſs of his age, to demand being reſtored to his full right.

ART. V.

Of the heirs of guardians, and how far they are bound by the deeds of theſe their predeceſſors.

(*De heredibus tutorum conveniendis.*)

§ 40.

THE actions which may be intented againſt guardians take place alſo againſt their heirs; and this, even though the guardian were not willing to adminiſter the office conferred upon him by the judge, or though he had given up, without a lawful cauſe, a guardianſhip which he had begun to adminiſter.

§ 41.

A guardian's heirs are then obliged, after his death, to give in his accounts, and to be anſwerable for the defunct's negligence.

Provided always, nevertheleſs, that they be only anſwerable when the guardian has occaſioned any prejudice to the pupil, by uſing deceit, or by committing any great fault *. For our will is, that they be not made anſwerable when the fault is only ſlight, that is to ſay, a failure in the care and attention which a maſter of a family, who is a good manager, uſes to beſtow on his own affairs.

1.) Unleſs the ſuit were already begun with the defunct, and the cauſe debated:

2.) Or unleſs the defunct uſe the pupil's fortune to draw any advantage from it, and had, in effect, profited by it, even though none of the profit ſhould redound to the heirs.

* Latam culpam.

§ 42.

§ 42.

A guardian's heirs may alſo, in certain caſes, be ſued for his own proper deed, by an action called *actio tutelæ utilis*;

1.) When, being of age, he does not finiſh what the defunct guardian had begun.

2.) If he expend the pupil's money, which the defunct had collected.

3.) If he receive the ſums which the defunct had lent, or which were promiſed to be paid to him, without ſtating them to account.

4.) If he poſſeſs a thing belonging to the pupil; in which caſe the latter may alſo get it by an action of claim, or challenge. It muſt be obſerved, that, when the heirs may be ſued for their own proper deed, they are alſo accountable for a ſlight fault, and that the oath called *in litem* takes place alſo againſt them.

§ 43.

If the heirs do not judicially notify the guardian's deceaſe, as they are bound to do, (ſee tit. X. § 2. n. 3.); and if they do not offer to bring in the accounts, nor demand another guardian to be appointed, but, without neceſſity, take on themſelves the adminiſtration of the office, they ſhall be regarded as falſe guardians, unleſs they themſelves be ſtill under age, in which caſe they may be relieved from the adminiſtration.

ART. VI.

Of the ſureties brought by guardians, as alſo of ſuch as have propoſed a guardian, or certified that he was ſolvent.

(De fidejuſſoribus, nominatoribus, et affirmatoribus conveniendis.

§ 44.

WE have already ordained, that guardians ſhall be bound to give ſecurity, which is uſually done by means of ſureties, or bail.

§ 45.

When a guardian brings a ſurety or bail, his conſent muſt be given in writing, and adhibited to the deeds; or, if he offer himſelf, a record ſhall be made of his declaration; but it ſhall not be ſufficient that he appear in judgment, and know that, in the record, mention is made of him as a ſurety; for our will is, that the judge, to avoid all miſunderſtanding, or any occaſion of a law-ſuit on this head, expreſsly require his conſent, and that, if he fail to do ſo, he be bound to anſwer for all the damage which may happen from that neglect.

§ 46.

We are to regard as ſureties,

1.) Such as ſhall propoſe guardians, either by themſelves, or by others; becauſe one ought not to propoſe a perſon for a guardian, who is not ſolvent and fit for the office.

2.) Such as have certified that the guardian was ſolvent.

If

If a mother have propoſed a guardian, or certified that one propoſed by others was ſolvent, ſhe cannot be made anſwerable for it, becauſe of the benefit of the Velleian decree which ſhe enjoys. If, nevertheleſs, the guardian were confirmed at the mother's riſk and peril, her exception, in virtue of that decree, would not take place.

§ 47.

If, after the guardianſhip is ended, the guardian remain indebted to the pupil, without being able to pay what he owes, the pupil may ſue the ſurety, in an action called *de fidejuſſoribus conveniendis.*

If one ſingle guardian have brought ſeveral ſureties, or if ſeveral guardians intruſted with the office, have each their particular ſurety, every ſurety may be proſecuted for the whole, with regard to the adminiſtration of all thoſe guardians, without having it in his power to allege in his own favour the benefit of diviſion.

From this rule muſt be excepted the two caſes following.

1.) When ſureties are bound only for a certain ſum,

2.) And when the adminiſtration of the guardianſhip has been divided by the judge himſelf, who, in this caſe, ought to have required from each a ſurety proportioned to the adminiſtration intruſted to him.

Such as have not formally become ſureties, and have only propoſed a guardian, or certified that he was ſolvent, cannot be ſued till after the guardians who have adminiſtered, after their heirs, and after the formal ſureties.

§ 48.

Moreover, the ſureties are not obliged to be anſwerable for the guardian any longer than his office continues, and they are only bound for the agreements

ments which he made in his quality of guardian.

If then a guardian, when his pupil is arrived at the age of puberty, continue without neceſſity, and voluntarily, to adminiſter his effects, the ſurety cannot be made anſwerable for the guardian's adminiſtration: but our will is, that the judge oblige the guardian to give new ſecurity, if he want ſtill to continue the adminiſtration in quality of curator.

ART. VII.

How magiſtrates, or judges, may be ſued ſubſidiarily.

(De magiſtratibus conveniendis.)

§ 49.

WHen a pupil cannot be paid of what is due to him by his guardian,

a) Neither by the guardian himſelf, nor by the vice-guardian, nor by the falſe guardian, and their heirs;

b) Nor by the ſureties, nor by ſuch as have propoſed the guardian, or declared him ſolvent, and by their heirs.

c) Nor by ſuch as have fraudulently acquired any thing belonging to the pupil, under the authority of his guardian, who may be ſued by a Paulian action *: in ſuch caſes the pupil may have his recourſe againſt the magiſtrate, who has been guilty of any fault or negligence in the appointment of his guardian, and may intent againſt him a ſubſidiary action of guardianſhip †.

It appears by what is ordained, that our intention is, as to honorary guardians, that they cannot be ſued till after the magiſtrates are diſcuſſed or diſtrained.

* Actione Pauliana. † Actionem tutelæ ſubſidiariam.

§ 50.

§ 50.

This ſubſidiary action takes place then againſt the magiſtrate;

1.) When he has not appointed any guardian for the pupil;

2.) When he has not named him in time;

3.) When he has not appointed one who was ſolvent, or who had good ſureties;

4.) When he has not cauſed the guardian to give in his yearly accounts; and, in general,

5.) When he has not given all the care and attention that judges uſually employ in the exerciſe of their office; provided always that thereby the pupil have ſuffered any loſs or damage.

A magiſtrate who pretends that he has uſed all proper precautions on this head, ſhall be bound to prove his aſſertion.

§ 51.

When the judicatory which is intended to be made anſwerable, ſhall be compoſed of ſeveral members, the ſubſidiary action may be intented againſt each of thoſe who have aſſiſted at the deed by which the pupil finds himſelf wronged; but only to make them pay the loſs proportionally.

If one of them, nevertheleſs, have alone exerciſed the office, he may be ſued for the whole; and, in like manner, all the members of a court of juſtice may be ſued for the whole, if the court have been guilty of any fraud; and with ſtill greater reaſon might that one of the members be ſued for the whole, who alone was guilty of the fraud. Moreover, it naturally follows, that the oath called *in litem* takes place againſt the court of juſtice, which has been guilty of a fraud.

§ 52.

Nothing can be imputed to a court of judicatory, if the ſurety was ſolvent at the time he was received,

or

or if the guardian, not being able to give ſurety, was confirmed at a time when he had the reputation of an honeſt man, and a good œconomiſt. Nevertheleſs, if, during his adminiſtration, his conduct was altered, and the judicatory might eaſily have been informed of it, they would not be freed from fault, and might, according to circumſtances, be made anſwerable for it.

§ 53.

A pupil has no right to a tacit hypothec, on the effects of perſons compoſing the court of juſtice, and conſequently cannot claim, in the competition of creditors, a right of preference over others.

§ 54.

A court of juſtice is bound, by virtue of this action, to repair all the damage occaſioned to a pupil by his guardian's fault: and, conſequently, the pupil may demand from the court all that he would have a right to exact from the guardian himſelf, by virtue of an action of guardianſhip.

§ 55.

When the perſons who compoſe the court of juſtice, and might be ſued, are dead, the ſame action may ſtill be intented againſt their heirs: but theſe can be made anſwerable only for the great faults, or frauds, of the defunct judges, but not for the ſlight faults which they may have committed. See § 50. n. 5.

TITLE

TITLE X.

By what means guardianſhip comes to an end.

(Quibus modis tutela finiatur.)

§ 1.

I. GUardianſhip ends by the puberty of the pupil, when a boy has attained the age of fourteen years complete, and a girl that of twelve. See tit. XIII. § 1.

§ 2.

II. By the death of the pupil. But, in this caſe, the guardian ſhall continue to adminiſter till the heirs preſent themſelves; and he ſhall not be freed from his engagements till he has given in his accounts, and obtained their diſcharge. Guardianſhip ends alſo when a pupil is adopted, and paſſes under the paternal power of the adopter.

III. By the guardian's death; in which caſe his teſtamentary heirs ſhall be bound to notify his deceaſe to the judge, within the ſpace of four weeks, reckoning from the day they have heard it, and to demand that another guardian be appointed, or a curator named for a time, as alſo an adjournment appointed for giving in the accounts. See the preceding title, § 43.

If the heirs be much diſperſed and remote, or unknown, the judge ſhall name, by virtue of his office, ſome perſon, to take care that no prejudice be done to the pupil. If there be no teſtamentary heirs, the pupil's neareſt relation, or the judge, ſhall be bound to take care that his effects be adminiſtered, the guardian or curator named, the accounts given in, &c.

IV. By the guardian's preſcription, or outlawry *; as alſo by the loſs of the right of a burgeſs or citizen, when he is deprived of it on account of any crime; by his deſertion, and by his baniſhment. A guardianſhip ends alſo, when the guardian has been condemned to be ſhut up during life in a fortreſs, or in the houſe of correction.

V. By the exiſtence of the condition on which a man was named guardian, and by the expiration of the time for which he was named; provided always that he be a guardian named by a will, or by a codicil; for the judge can neither appoint a guardian conditionally, nor for a time. When, in the caſe here in queſtion, a guardian wants to continue his adminiſtration, and no oppoſition is made to it, he may remain in the adminiſtration; if not, the judge muſt appoint another.

VI. By means of lawful excuſe, or

VII. By the deprivation of a ſuſpected guardian.

Of theſe two laſt caſes we ſhall treat in the following titles.

VIII. By the mother's ſecond marriage; in which caſe the guardianſhip belongs to the neareſt relations. And if there be none, the mother ſhall be bound, within the ſpace preſcribed above, to propoſe other guardians, who ſhall be confirmed by the judge; unleſs he think it more convenient to appoint others by virtue of his office. We leave it alſo in the power of judges, to permit the mother, on giving ſufficient ſecurity, to continue the adminiſtration, after having given in her accounts, and ſettled her childrens affairs.

IX. By alterations which happen in the guardian's perſon, when he becomes furious, or mad, or falls into other infirmities which render him incapable of

* Wenn der vormund in die acht erklæret wird.

managing

managing his own affairs; as alſo when he is declared a ſpendthrift.

X. In fine, a guardianſhip ends with the deed for which the guardian was appointed, when he was only appointed for that deed. Moreover, it has been obſerved above, tit. II. § 19. on what occaſion a guardian is appointed for one ſingle deed.

§ 3.

When a father, or a judge, has named ſeveral guardians, and one of them happens to die, the judge ſhall examine whether it be neceſſary to replace him, or whether it be proper to leave the adminiſtration to the reſt.

§ 4.

When a guardianſhip is drawing to an end, and the guardian, who cannot be conſtrained to adminiſter as curator, ſhall not think proper to do ſo, he ſhall notify this timeouſly to the pupil, and ſhall let him know that he ought to inquire for a curator, and propoſe him to the judge, to get him confirmed.

If the pupil do not take that trouble, the guardian ſhall be bound, at leaſt four weeks before the end of his adminiſtration, on pain of ten to fifty rix-dollars,

1.) To declare to the judge that the guardianſhip is ready to expire, and

2.) To demand that a curator be named for his pupil. He ſhall alſo be obliged,

3.) To propoſe, for this purpoſe, two of the neareſt relations moſt capable of the adminiſtration; and if there be none, he ſhall propoſe one or two other perſons of probity. See tit. XIII. § 9. n. 3.

4.) When the curator is appointed, the guardian ſhall communicate to him the laſt accounts, with the inventory, which ought to contain a faithful extract of all the accounts given in during the guardianſhip, and an exact liſt of the debts due to, or by the pupil.

5.) He ſhall demand that a day be appointed to receive his accounts.

In the mean time, 6.) He ſhall deliver to the curator, immediately after his confirmation, the balance in ready money, and all that he ſhall have in hand, whether grain, furniture, or moveable effects.

And, 7.) After having given in his accounts, and ſhewn that he has delivered every thing, he ſhall demand, and get a diſcharge from the judge.

On the other ſide, 8.) The minor and his curator ſhall immediately be obliged to make good to his guardian the neceſſary and uſeful advances which he ſhall prove to have been made by him, which ought, moreover, to be ſettled at the giving in of the accounts.

9.) When the guardianſhip ends in any other way than by puberty, and when, for this reaſon, a new guardian is to be appointed, and not a curator, the preceding guardian, or ſuch as are obliged to propoſe guardians, ſhall be bound to ſolicit for the appointment of one; after which the proceedings, with regard to giving in the accounts, to the diſcharge, and to the delivery of the pupil's effects, ſhall be in the manner juſt directed.

§ 5.

If a guardian, four weeks after his office is ended, do not over again ſolicit the appointment of another guardian, he ſhall be regarded as the lawful curator, and ſhall not afterward be allowed to excuſe himſelf from accepting the curatory: it ſhall not even be neceſſary for him to be confirmed, and the only thing proper to be regulated ſhall be his ſurety, which he is to give of new. See tit. XIII. § 9. n. 3.

TITLE

TITLE XI.

Of the excuſes of guardians.

(De excuſatione tutorum.)

§ 1.

GUardianſhip is a public truſt, which none, excepting a mother and a grandmother, can be excuſed from accepting; and our will is, that ſuch as ſhall refuſe to accept the guardianſhip conferred upon them, ſhall be conſtrained ſo to do by way of execution.

We allow, nevertheleſs, ſuch as have been named guardians, whether teſtamentary, legal, or appointed by the judge, to be excuſed, when they ſhall have good reaſons for being exempted from the office.

§ 2.

Moreover, the queſtion here is not concerning ſuch as cannot be guardians, or who cannot be ſo without our conſent, (of whom we have treated, book III. tit. II. § 3. and 9.), becauſe they have no need of an excuſe; and even though they ſhould not decline the guardianſhip, they would nevertheleſs be excuſed from the office, as they cannot be confirmed by the judge.

§ 3.

There are ſeveral means of excuſe, of which ſome procure exemption from a guardianſhip conferred, and others procure a diſcharge from that already begun to be adminiſtered.

§ 4.

The arguments which excuſe from accepting a guardianſhip conferred are the following:

I. When a perſon has five lawful children alive, in which

which number we do not comprehend grandchildren. Among the living alſo ſhall be reckoned ſuch as ſhall die in our ſervice fighting for the ſtate, whether in a ſkirmiſh, or in a battle. If the fifth child be born after the guardian has begun to adminiſter, he could not thereby be excuſed.

II. When the guardians named are not twenty-five years complete, or are paſt ſeventy.

III. Clergymen or paſtors who have really cure of ſouls may be excuſed, unleſs it be from a guardianſhip of a paſtor's child.

IV. Alſo the ordinary ſettled profeſſors in the univerſities and academies, when they really teach there; unleſs it be the guardianſhip of a child of ſome of their colleagues.

This privilege, moreover, ſhall not be extended to the extraordinary profeſſors, nor to other doctors who give lectures in the univerſities.

V. Alſo the regents or rectors of colleges, or public ſchools, who beſtow all their time in inſtructing of youth.

VI. Alſo a man who is obliged to be abſent for a long time, when it is not known when he will return, and above all, one who may be abſent about our affairs; and our will is, that this privilege may be extended to ſuch as accompany him, as envoys, attendants, whether we have given them to him, or he himſelf have taken them into his ſervice.

VII. Alſo a teſtamentary guardian, or one who is called to the office by proximity of kindred, when he is not an inhabitant of the place *.

VIII. Alſo one who can neither read nor write, as likewiſe one who is not ſkilled in the adminiſtration with which he is to be intruſted; as if, in the guardianſhip of a merchant's children, whoſe trade is very exten-

* Extra forum domicilii.

ſive,

ſive, a man of letters were propoſed for the adminiſtration.

IX. Alſo one who has already the charge of three guardianſhips; but it is requiſite that they really be three effectual and different guardianſhips, ſuch as oblige the guardian to adminiſter and keep accounts.

If then one or two of theſe guardianſhips relate only to poor pupils, who have little or no fortune, or whoſe incomes conſiſt only in intereſt, and the guardian have nothing elſe to do but to receive them, he could not be excuſed from the fourth guardianſhip: far leſs can he be excuſed if he be only appointed to three honorary guardianſhips, or if one of the three burdenſome guardianſhips were ready to expire.

We allow to be included in the number of three guardianſhips, a father's adminiſtration who manages the fortune of his children when that fortune is conſiderable: but if one ſingle guardianſhip or two be ſo extenſive as entirely to employ the guardian, he cannot be conſtrained to take upon him a new burden, provided he prove the importance of his charge, by producing the inventory and his accounts.

X. Alſo merchants who having very extenſive buſineſs, are ſufficiently employed at home; unleſs it be in a guardianſhip of another merchant's children.

XI. Alſo watermen who tranſport merchandiſe from one place to another, and have no conſtant reſidence.

XII. Alſo ſuch as have infirmities which incapacitate them for the management of their own affairs, as if they be blind, deaf, dumb, or ſeized with a lingering diſeaſe, with the falling-ſickneſs, or with a leproſy.

XIII. Alſo ſuch as have their reſidence more than ten leagues diſtant from that of the pupil.

XIV. Alſo a guardian who is appointed for a certain deed, or for a certain time, or for a particular affair.

XV. Alſo

XV. Alſo one, who after being long abſent on affairs which concern our intereſts, who may be excuſed for the firſt year after his return, after which he can no longer be exempted.

§ 5.

If the arguments of excuſe alleged by one who is intended to be guardian be contradicted, the judge ſhall take cogniſance of them, and the fiſcal ſhall undertake the pupil's defence.

§ 6.

1.) Moreover, ſuch as have promiſed to the defunct, as well as thoſe who, after his death, have declared their willingneſs to accept the guardianſhip, cannot be excuſed;

2.) Neither a ſon who has been named guardian by his father.

3.) If the teſtator leave a legacy to one whom he names guardian of his children, and the latter receive it, he can no longer be excuſed.

It muſt be obſerved, that if he have alleged the excuſe before receiving the legacy, he would be exempted, but he would loſe the legacy.

§ 7.

When a guardian has begun already to adminiſter, he may get himſelf diſcharged in the following caſes, and conſequently the guardianſhip is ended with reſpect to him:

I. When he is obliged to make a journey on our affairs, and in all appearance may be abſent for a year and more.

II. When by our order he ſhall change his reſidence, or when we ſhall give him permiſſion to do ſo; though we be informed that he is intruſted with a guardianſhip.

III. When he becomes incapable of managing his own affairs. See § 4. n. 12.

IV. When

IV. When there happen any changes in the guardian's perſon, which render him quite incapable of managing the guardianſhip, or which do not allow him to adminiſter without our approbation, or without the conſent of our courts of juſtice, (ſee book III. tit. II. § 8. and 9.), he ſhall be bound, if he intends not to be regarded as a falſe guardian, to notify theſe changes within fifteen days to the judge, and alſo to demand both his own diſcharge, and the ſettlement of another guardian, or our conſent, if it be a caſe in which it is requiſite.

§ 8.

A guardian cannot appeal from the ſentence of the judge who names him guardian, if he have no other grievance than that of being named guardian; but he ſhall be obliged to propoſe his arguments of excuſe to the judge who has appointed him, within the ſpace of four weeks, reckoning from the time that he was acquainted with his nomination, or at the day appointed in his citation to perform the conditions required of guardians.

§ 9.

All the arguments of excuſe ſhall be propoſed at once; and it ſhall not be allowable to propoſe any other afterward, not even in pleading the appeal.

§ 10.

If the judge find thoſe excuſes ſufficient, the guardian named ſhall be diſcharged; and ſuch as are obliged to propoſe guardians, or to appoint them, ſhall be bound to propoſe and appoint ſuch as are ſolvent, and capable of adminiſtering the office.

§ 11.

If the excuſes do not appear ſufficient to the judge, and if the guardian named be ordained to take upon him the office, he ſhall have liberty to appeal from the ſentence; and, in the mean time, a curator ſhall

be named: but if the ſentence be confirmed on the appeal, the guardian named not only ſhall be obliged for all the loſs which has happened by his refuſal, from the time that the guardianſhip was conferred on him, but he ſhall even be made anſwerable for the curator's deeds.

§ 12.

The parties ſhall not be ordained to write and produce on the ſubject of the arguments of excuſe; but if the affair be of too long diſcuſſion to be carried into court *, it ſhall be ſufficient to make an order of production every third day.

§ 13.

Moreover, our will is not to allow the proceſs concerning excuſes a third hearing, though the two firſt ſentences be different.

TITLE XII.

Of ſuſpected guardians, and of their deprivation.

(De ſuſpectis tutoribus.)

§ 1.

A Guardianſhip is alſo ended when the guardian is accuſed as ſuſpected, and when, in conſequence of the accuſation, he is deprived of the office by a ſentence.

§ 2.

Guardians are regarded as ſuſpected, who, forgetting their engagements, and the oath which they have ſworn, neglect the pupil's perſon and effects, or do not exerciſe their office with the diligence and fidelity

* Loco oralis.

requiſite:

requiſite: for example, if they be not careful of the pupil's education, and do not afford him maintenance; if they renounce the ſucceſſion which devolves upon him, though it be advantageous; if they fraudulently imbezzle any of his effects; if they take upon them to alienate his effects, to ſubject them to burdens, or to make alterations in them before the judge has taken cogniſance of them, and without his having granted a permiſſion; as alſo, if they make no inventory, if they begin to adminiſter without being confirmed, *&c.*

The guardian's poverty ſhall not alone be ſufficient to ſet him aſide: it may nevertheleſs induce the judge to join another guardian with him, and even to take other meaſures for the advantage and ſecurity of the pupil.

§ 3.

It is allowable for every perſon to inform againſt or accuſe a guardian as ſuſpected; ſo that women, minors, and even a deprived guardian, ſhall be allowed to intent this accuſation.

§ 4.

Nevertheleſs there are ſome perſons who are obliged to accuſe as ſuſpected guardians whoſe conduct merits deprivation. Such are,

a) Joint guardians; *(contutores)*;

b) Honorary guardians;

c) The judge who is bound to do ſo by his office, when no body offers for that purpoſe.

d) The officers of the exchequer, when they are informed of the male-adminiſtration of guardians.

§ 5.

All guardians may be accuſed as ſuſpected, whether they be teſtamentary, legal, or appointed by the judge.

§ 6.

The judge ſhall examine deliberately the grounds of the accuſation which render a guardian ſuſpected; and after hearing the guardian briefly on what he can allege in his own juſtification, he ſhall act according to circumſtances, and ſhall deprive the guardian of the adminiſtration, or join another guardian with him: this laſt method ſhall be taken chiefly with legal guardians, and when the probable evidences againſt them are not very ſtrong.

Moreover, our will is, that no appeal can be made againſt ſuch ſentences as are only given for the mean time.

§ 7.

If, after taking the examination, it be found that the guardian was only guilty of what is called a ſlight fault, that is to ſay, of a neglect into which prudent maſters of families are not accuſtomed to fall, he cannot be depoſed as ſuſpected; but he ſhall be made anſwerable for the loſs, by an action of guardianſhip.

If he were guilty of a great fault, that is to ſay, of ſuch a neglect as maſters of families, otherwiſe not the beſt œconomiſts, nevertheleſs do not fall into, this ſhall be a ſufficient reaſon to deprive him. And if his male-adminiſtration were deliberate and fraudulent, he ſhall not only be ſet aſide, but he ſhall for that very thing be branded with infamy, and beſides arbitrarily puniſhed; unleſs he be related to the pupil, in which caſe neither the infamy nor arbitrary puniſhment ſhall be inflicted.

§ 8.

If a guardian appointed by ſentence will not accept the office, or if he advance maliciouſly againſt the truth, that the pupil having no funds, he cannot afford his maintenance, the pupil ſhall be put in poſſeſſion of the guardian's effects, from which a maintenance ſhall be taken for him, and that under the direction of a curator, to be named for this purpoſe; who,

who, in the mean time, ſhall take care of the pupil's perſon and effects, ſhall alienate what is periſhable, and ſhall do every thing that the guardian ought to have done, and yet the guardian ſhall ſtill continue to be anſwerable.

When the judge ſhall find it convenient to ſet aſide a refractory guardian, and to appoint another, he ſhall have authority ſo to do; and moreover, the froward guardian ſhall be treated in the ſame manner as one who is ſet aſide for fraudulent practices.

§ 9.

And that it may be known whether the guardian ſet aſide be branded with infamy, our will is, that as often as a guardian ſhall be deprived, the ſentence ſhall bear the cauſe of his deprivation.

When the ſentence ſhall allege none, it ſhall be preſumed that the deprivation was ordered more on account of the great negligence * of the guardian, than on account of his malice and infidelity: and indeed we do not deſign, that, in this caſe, the deprivation ſhall prejudice either his honour, or his fortune, or his reputation.

§ 10.

The accuſation ſhall be intented againſt the guardian before the judge-ordinary who confirmed him in his office, though he be not veſted with criminal juriſdiction.

The accuſation of a guardian as ſuſpected ceaſes,

1.) When, during the trial, the guardianſhip is ended,

2.) Or when the guardian dies before ſentence. In both caſes the pupil preſerves the actions allowed to him, to be intented when the guardianſhip is ended.

* Ob latam culpam.

TITLE

TITLE XIII.

Of the curators given to pupils or minors, and other perſons incapable of managing themſelves, and taking care of their affairs.

(*De curatoribus et cura.*)

§ 1.

GUardianſhip comes to an end with the pupil's puberty, namely, when a girl has attained the age of twelve years complete, and a boy that of fourteen. See tit. II. § 21. and tit. X. § 1.

But a pupil, becauſe he has arrived at the age of minority, has not a right to adminiſter his own effects; and our will is, that a curator be appointed for him, till he be twenty-five years complete.

§ 2.

Minors are not the only perſons to whom curators are given; there are alſo perſons of age, for whom they are appointed in certain caſes, namely,

1.) When a man is fatuous or mad.

2.) When, by a ſentence or decree of the prince, a man has been declared a ſquanderer, ſpendthrift, or prodigal; in which caſe the adminiſtration of his effects ſhall immediately be taken from him; even though he appeal from the judgment by which he is interdicted or inhibited.

3.) When a man, by accident, has become deaf or dumb.

4.) When a man is abſent for a long tract of years, and the place of his reſidence is not known.

5.) When a competition of creditors ariſes, a curator,

rator, or truſtee, is appointed to take care of the whole effects.

§ 3.

There are even caſes in which a curator ought to be appointed for pupils, though they have a guardian. This is neceſſary in the caſes mentioned above, tit. II. § 20.; as alſo when the guardian, during his adminiſtration, becomes the pupil's creditor or debtor.

§ 4.

It happens even that a curator is given to a pupil or minor, who is under the paternal power; namely,

1.) When the father marries a ſecond time, and wants to ſettle matters with his children. See book II. tit. III. § 24.

2.) When a father becomes mad, or, being interdicted in a judicatory, has a curator given him, in which caſe the curator is alſo obliged to take care of the childrens effects.

3.) When a ſtranger leaves a legacy to another man's children, he may, at the ſame time, name a curator for them. See tit. III. § 2.

4.) When a father is guilty of male-adminiſtration of his childrens fortune, and ſquanders it.

5.) In fine, when a father will not take upon himſelf the care of his childrens effects, he is obliged to ſee that a curator be appointed for them.

§ 5.

A huſband is not the legal curator of his wife, though ſhe be ſtill a minor; but ſhe continues ſtill under the direction of her ordinary curator.

When ſhe has attained the age of twenty-five years, ſhe may diſpoſe of her own fortune freely, and without the conſent of her huſband.

§ 6.

Curatory is the power or authority with which a man

man is veſted, in order to take care of the effects of a perſon who, on account of his age, or for the other cauſes juſt mentioned, cannot adminiſter them himſelf.

Though the principal object of curatory be only the adminiſtration of the minor's effects, the curator is, nevertheleſs, obliged, at the ſame time, to have an eye over his conduct, and to take care that he get a good education. Wherefore alſo we have decreed, that a minor cannot marry without the conſent of his curator.

§ 7.

Curatory is, as well as guardianſhip, founded on reaſon and equity. See book III. tit. II. § 1. 2. 3.

§ 8.

The nomination of curators is made like that of guardians. For they are called to the curatory,

a) Either by will,

b) Or by proximity of kindred,

c) Or by the judge. See above, tit. III. IV. and V.

Whence it follows, that curatory is, in like manner, either *teſtamentary*, or *legal*, or *dative*.

§ 9.

All that is requiſite for a guardianſhip, is ſo likewiſe for a curatory.

I. Wherefore all ſuch as cannot be guardians, or who cannot be ſo without our conſent, or without that of our court of judicature, neither can they be intruſted with curatories. See above, tit. II. § 8. and 9.

II. What has been preſcribed with reſpect to foreign guardians, or ſuch as reſide out of the juriſdiction, ſhall equally take place with regard to curatories. See above, tit. II. § 12. and following.

III. All ſuch as are bound to ſolicit for the appointment of guardians, are alſo obliged to demand that of curators. But it belongs chiefly to the guardian, when his office is drawing to an end, to remind his pupil,

pupil to require himſelf a curator to be appointed for him, when the guardianſhip ſhall be ended. But if the pupil do it not, the guardian ſhall be bound, at leaſt four weeks before his office be expired, to declare to the judge, that he does not deſign to continue the adminiſtration, and to take upon him the curatory; in conſequence of which he ſhall demand that a curator be named for the pupil now arrived at the age of puberty, and ſhall propoſe, for this purpoſe, either the neareſt relations and agnats, or, if there be none, two other perſons of probity. See above, tit. X. § 4. It muſt be obſerved, that, if a guardian do not afterward make this declaration, he is reckoned to have taken upon him the curatory, without any neceſſity of confirmation; but, in this caſe, what concerns the ſurety, muſt be regulated anew. See above, tit. X. § 5.

IV. All the conditions which guardians ought to perform, before they can take upon them the office, muſt alſo be performed by curators. See above, tit. VI. § 1. and following.

V. Curators are obliged, as well as guardians, to take care of the education of ſuch as are intruſted to them, to adminiſter their effects, and to give in accounts of them. See above tit. VI. art. I. II. and III.

VI. Curators may, as well as guardians, tranſact alone all the minor's affairs, without having need of their conſent. See above, tit. VI. art. II. § 27.

Note, That when a minor himſelf diſpoſes of any of his effects, the curator does but give his conſent to it; which is not called interpoſing his authority, becauſe it does not ſupply the defect of underſtanding, but only the weakneſs of age.

VII. As a pupil may make acquiſitions by his guardian's means, and be ſued, or ſue an action, for deeds done by him, a minor may alſo purchaſe, by

means of his curator, and be ſued, or ſue an action relating to the ſame. See above, tit. VII.

VIII. All the actions which a pupil may ſue againſt his guardian, his vice-guardian, his falſe guardian, their ſureties, and their heirs, as alſo againſt the magiſtrate; the minor may ſue them againſt his curators, who may alſo proſecute againſt him the ſame actions that a guardian may ſue againſt his pupil. See above, tit. IX.

IX. Curatory comes to an end in the ſame manner as guardianſhip, excepting that a curatory ends the laſt day of the twenty-fifth year.

X. There is nevertheleſs a particular way of putting an end to a curatory, which takes place when the minor obtains a diſpenſation for his age *.

A diſpenſation on account of age ſhall not be granted,

a) If a young man be not twenty years complete, and a young woman eighteen.

b) If either of them do not produce a certificate from the judge, giving teſtimony of their good behaviour, and of their capacity in the management of their affairs.

c) If the judge be not beforehand exactly informed of the minor's behaviour, from his curator and near relations; whoſe atteſtations ought to be given in writing, and joined to the deed of diſpenſation.

d) If, when it is a perſon in ſervice, he do not produce a certificate from the commanding officer, or from his maſter.

e) When a minor has obtained a diſpenſation on account of age, he may freely diſpoſe of his effects, and act by himſelf, whether in judgment or out of judgment. This liberty, however, ſhall not be extended to immoveable ſubjects, which a minor can-

* Veniam ætatis.

not

not alienate without uſing the formalities neceſſary in the alienation of real eſtates belonging to pupils; and our will is, that the curatory ſtill ſubſiſt with reſpect to real eſtates, as it did before the minor had obtained the diſpenſation, on account of his age.

f) If a minor find himſelf wronged by the diſpenſation on account of age, he may indeed get himſelf relieved from it, and demand that the curator be obliged to continue his adminiſtration, or that a new curator be appointed for him; but the deeds which he ſhall execute as being of age, in conſequence of the diſpenſation, ſhall have their effect, that he who has contracted fairly with a perſon, whom we have declared of age, may not be a ſufferer for having confided in the public authority.

g) A minor who has obtained a diſpenſation on account of age, and who, pretending to be wronged, (which he ſhall be obliged to prove), wants to be relieved from the deeds which he executed in his minority, with the conſent of his curator, or from the deeds which the curator executed by himſelf, ſhall be bound to demand reſtitution to his right within four years, reckoning from the time that he obtained the diſpenſation on account of age: but, if he have got himſelf relieved from the diſpenſation itſelf, the four years would not begin to run till after he is twenty-five years complete.

h) As, by a particular edict, we have declared the nobility of age, when they ſhall have attained the age of twenty years, our will is, that they may not ſhorten that ſpace, by ſoliciting a diſpenſation on account of age, before the twentieth year. Beſides, this benefit of being of age, which we have granted them, is not extended to real eſtates, with reſpect to which the nobility, in like manner after twenty years as before, ſhall be under curatory.

XI. The excuſes which procure exemptions from

guardianſhips, do equally excuſe from curatories; ſee tit. XI. One particular excuſe, with reſpect to a curatory, is that of a guardian, who may be diſpenſed from continuing the adminiſtration of his pupil's effects, in quality of his curator. See above, tit. XI. § 4.

XII. A curator may be deprived, for the ſame cauſes which procure a guardian to be ſet aſide. See above, tit. XII. It muſt be obſerved, as a thing peculiar to a curator, that a minor may, with the approbation of his near relations, accuſe his curator as ſuſpected, which is not allowed to a pupil.

XIII. A curator has the ſame liberty as a guardian, who, being hindered from acting, may, at his own riſk, appoint a truſtee to act in his name. See above, tit. VI. art. III. § 55.

XIV. In fine, in the ſame way as all the guardian's fortune, when it has not been regiſtered, is nevertheleſs tacitly mortgaged, or pledged to the pupil; ſee above, tit. IX. art. I. § 9. n. 6.; ſo the curator's fortune is tacitly engaged to the minor.

§ 10.

When a minor is arrived at the age of twenty-five years, or of twenty, if he be a gentleman, and when, conſequently, the curatory is ended,

1.) The curator ſhall be bound, within the ſpace of four weeks, to communicate to the minor the laſt accounts of the curatory, to which he ſhall ſubjoin not only the inventory, but alſo an exact extract of all the accounts given in during the adminiſtration, and a faithful liſt of the debts due by the minor.

2.) He ſhall alſo agree with the minor now become of age, on a day to receive his accounts, or he ſhall demand that one be appointed by the judge.

3.) After which the proceedings ſhall be the ſame as

as preſcribed, with reſpect to giving in of the guardian's accounts. See above, tit. VII. § 54.

When a curatory ends in any other manner, than by the minor's becoming of age, the curator, who ceaſes to adminiſter, and his heir, ſhall not give in their accounts to the minor, nor deliver to him his effects; but they ſhall be obliged to be accountable, and to deliver the minor's effects to the new curator.

APPENDIX

APPENDIX to BOOK III.

No. I. At TITLE VI. § 9. N. IV.

Form of an Inventory.

INventory of all the effects, moveable and immoveable, which the defunct N. N. hath left after his deceaſe, and which now belong to his children, N. N. N. N. which are delivered to their guardians, N. N. taken by N. in preſence of N. N. the neareſt relations of the ſaid children, the ——— day of ——— year.

1. *In immoveables, and in titles, inſtructions, and other documents, conſtituting a real right.*

Under this head ſhall be comprehended the following articles; houſes, courts, arable lands, mills, gardens, meadows, ponds, vineyards, and other ſubjects; ſuch are, for example, thoſe which concern ſalt-works, and which are called *Kohen*, *pfannen*, or *ſoolgüter*, and their rights, *&c.* each with their pertinents, and the title-deeds and contracts of purchaſe, which concern them, as alſo the hypothecary or mortgage bonds and obligations, with a note of the principal ſums and yearly intereſt, and other documents conſtituting a real right.

In Moveables.

2. *In gold and ſilver coined.*

The appraiſing of the moveable effects ſhall be ſet down, and the ſpecies of gold and ſilver ſhall be marked.

3. *In*

3. *In jewels, rings, and gold and ſilver plate.*

All the gold and ſilver plate ſhall be weighed, piece by piece, and care ſhall be taken to mark their ſtandard and their weights.

4. *In utenſils of pewter, braſs, and copper.*

Every thing ſhall be weighed and deſcribed. This head ſhall alſo include cloaths, beds, their furniture, linens, and other like articles, and family-utenſils.

When the ſucceſſion is conſiderable, and includes, for example, a great proviſion of caſks, hogſheads, and cellar-utenſils, particular heads ſhall be made of them, ſpecifying them in the order they lie upon the gawn-trees, treſtles, or ſtillings; and as to the other family-furniture, it ſhall be enumerated and deſcribed as it is in the ſeveral apartments, inventorying piece by piece. If there be among the effects of the ſucceſſion, horſes, horned cattle, hogs, ſheep, and other beſtial, as alſo carts and harneſs, every article ſhall in like manner be particularly ſpecified.

5. *In wine, beer, grain, as wheat, barley, oats,* &c.

Every article ſhall be enumerated under its proper head; which ſhall alſo be obſerved with reſpect to hay, ſtraw, killed meat, bacon, butter, cheeſe, and other ſuch like wares and proviſions for the kitchen, as in the other moveable effects.

6. *In debts.*

Under this head ſhall be marked all the debts due to the pupils which are come to knowledge, whether at the time of making the inventory, or at the diviſion of the ſucceſſion, or otherwiſe; noting how and by whom they are due. And if there are any debts due by the pupils that are known, they ſhall alſo be ſpecified in the inventory.

No. II. at TITLE VI. ART. I. § 23.

Edict againſt the abuſe of learning.

THE King our gracious Sovereign, having taken into conſideration the complaints which have been long made, that learning in all the faculties is fallen into contempt, becauſe every one, even peaſants and tradeſmen, claim a learned education for their children, and to have them maintained in the univerſities and ſchools, or eminent colleges, at the public expenſe; without even attending whether their children have the genius and capacity requiſite to make any progreſs in learning: and as it is of much greater importance for the good of the ſtate, and of ſociety, that perſons who are not fit for learning, be educated in ſuch manner as they may be employed in manufactures, in trades, in the army, and even in agriculture, according to their ſtation and inclination, and find thereby means of gaining their bread: The King, induced by his paternal affection for his country, has reflected on what might remedy the inconvenience ariſing from this abuſe, reſtore literature to honour, and bring advantage to the public. For theſe cauſes the King has ordained, and very ſeriouſly ordains, by theſe preſents, the magiſtrates in towns, and eſpecially ſuch to whom the inſpection of ſchools is intruſted, to viſit them carefully, and to give a moſt particular attention to the youth who frequent them, that they may be in a condition to diſtinguiſh the young people who give proofs of their talents and application, from ſuch as have no genius, or who, on account of their lazineſs, indolence, or ſmall inclination to ſtudy, are nowiſe qualified for a learned education; the King, willing,

on

on one ſide, that they encourage the firſt to continue their ſtudies, and give them the aſſiſtance they ſhall want, and, on the other, that they diſſuade the laſt from literary purſuits, and exhort them to apply themſelves to ſome manufacture, or to learn a trade, or ſome other honeſt profeſſion, not allowing them to be inſtructed in any other thing but in religion, and reading, writing, and arithmetic; that we may no longer ſee any of thoſe ſtudents, who, being arrived at the age of twenty or thirty years, are ſtill a burden to the public and to themſelves, and do little honour to their maſters and regents. For ſuch is the King's good pleaſure. Given at Charlottenburg, the 25th of Auguſt 1708.

(L. S.) FREDERIC.

(and below),

The Count of WARTENBERG.

No. III.

Form of the accounts of guardianſhip for the ſecond year, given in by N. N. concerning the effects left by N. N. to his ſon, from the year ..... till the year .....

Extract of the inventory,

Containing the ſtate or remainder of the effects ſince the preceding accounts were cloſed, which is to be taken for a foundation of the new accounts.

Rix.	Gros	Fen.	I. *Sums laid out.*
1000			a) According to the bond of N. N. dated the —— day of —— in the year —— at five *per cent.*
100			b) For rye ſold, which the pupil gets from the farmer in kind, *(pacht-rocken)*, and which is to be paid at Eaſter this current year.
19	12		c) Due by N. according to the defunct's books for ——
250			d) According to the bond of N. dated —— at five *per cent.*
1000			e) According to the bond of N. dated —— at ſix *per cent.*
3000			f) According to the bond of N. N. dated —— at five *per cent.*
2000			g) Which are due, beſides 15 years intereſt at five *per cent.* according to the bond of N. N. dated ——, with reſpect to which there is a proceſs of competition raiſed.
7369	12		

II. *In immoveable ſubjects.*

a) —— * houffes of land, which yield annually four wiſpels of rye.
b) The lands of N. which are ſet for 600 rix-dollars a-year.

* Houffe *ſeems to be a German meaſure of land, either ſtated, ſuch as* acre; *or more vague, ſuch as* ridge, plot, *&c.*

c) The

c) The houſe left in legacy to the pupil over and above his ſhare, and of which the rent amounts to 50 rix-dollars.

d) Another houſe ſituated ——— which being in bad repair, has only yielded 15 rix-dollars of yearly rent, (which could not be let at preſent.)

e) By virtue of the act of diviſion, dated ———, the pupil has alſo claims for two houſes of land, and a meadow, which muſt be ſued for at law.

III. *In furniture and moveable effects.*

There was none remaining unſold after the laſt accounts were cloſed.

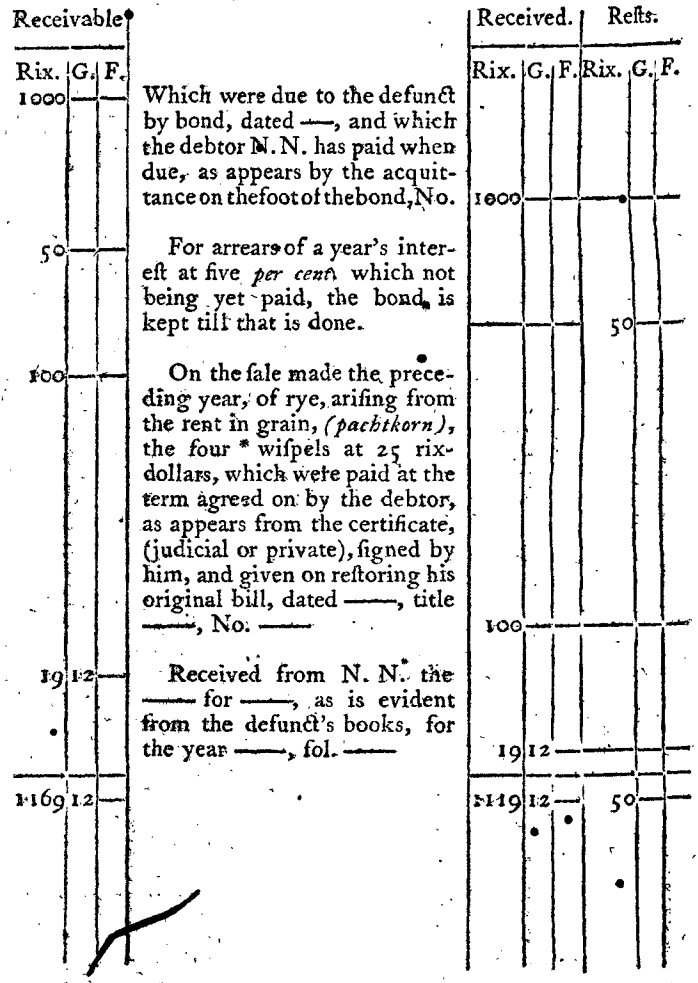
RECEIPTS

Of the remainder of the effects, and the arrears of the preceding year.

Receivable			Containing the following articles.	Received.			Reſts.		
Rix.	G.	F.		Rix.	G.	F.	Rix.	G.	F.
100	—	—	In ready money, - - -	100	—	—	—	—	—
7369	12	—	In ſums laid out.						
			In current intereſt.						
			Of incomes conſiſting in ſtores of grain, *(Kornpacht.)*						
			For the farm of the lands						
			For the houſe-rent of ——						

YEAR .

..... Branch of the accountant's receipts, containing ſums laid out, and other debts receivable.

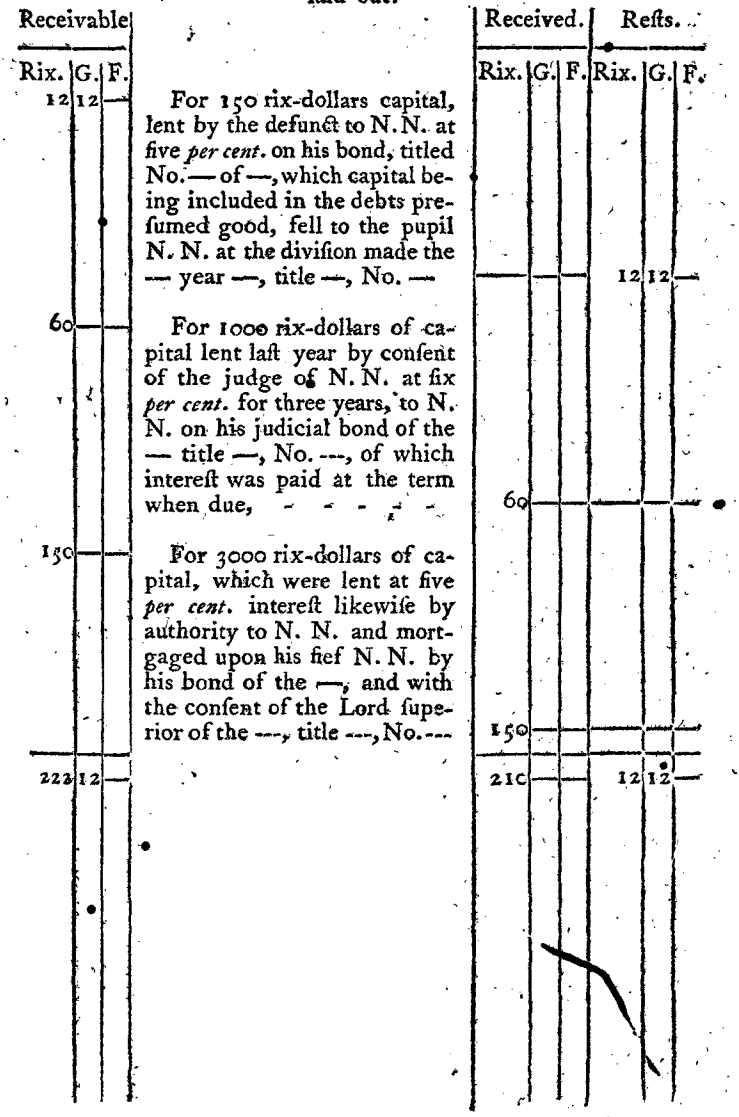


* Wiſpel *is a German meaſure, either ſtated, ſuch as* quarter, boll, buſhel; *or more vague, ſuch as* ſtack, ſhock.

YEAR

YEAR

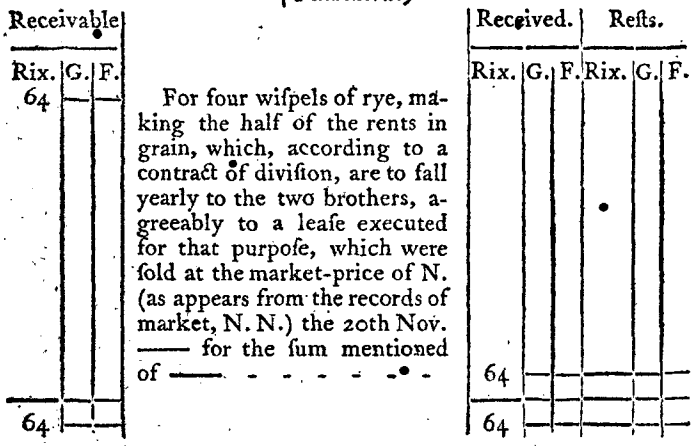
..... Branch of the accountant's receipts of intereſt of ſums laid out.



YEAR

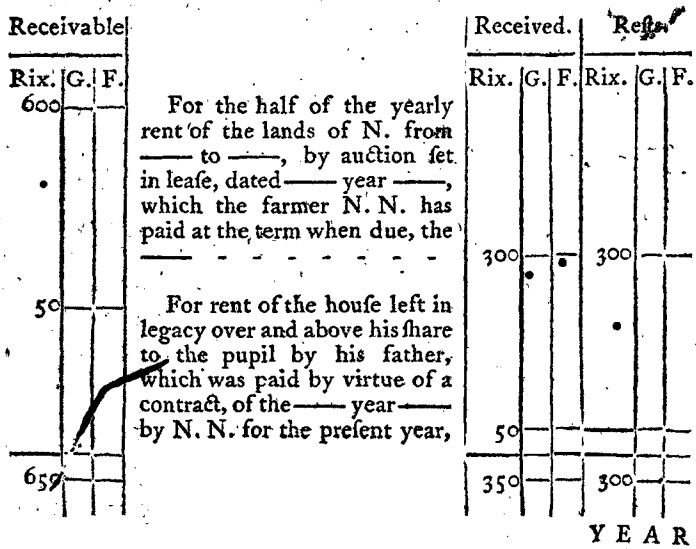
.... Branch of the accountant's receipts, concerning rents in grain.

(Pachtkorn.)



YEAR

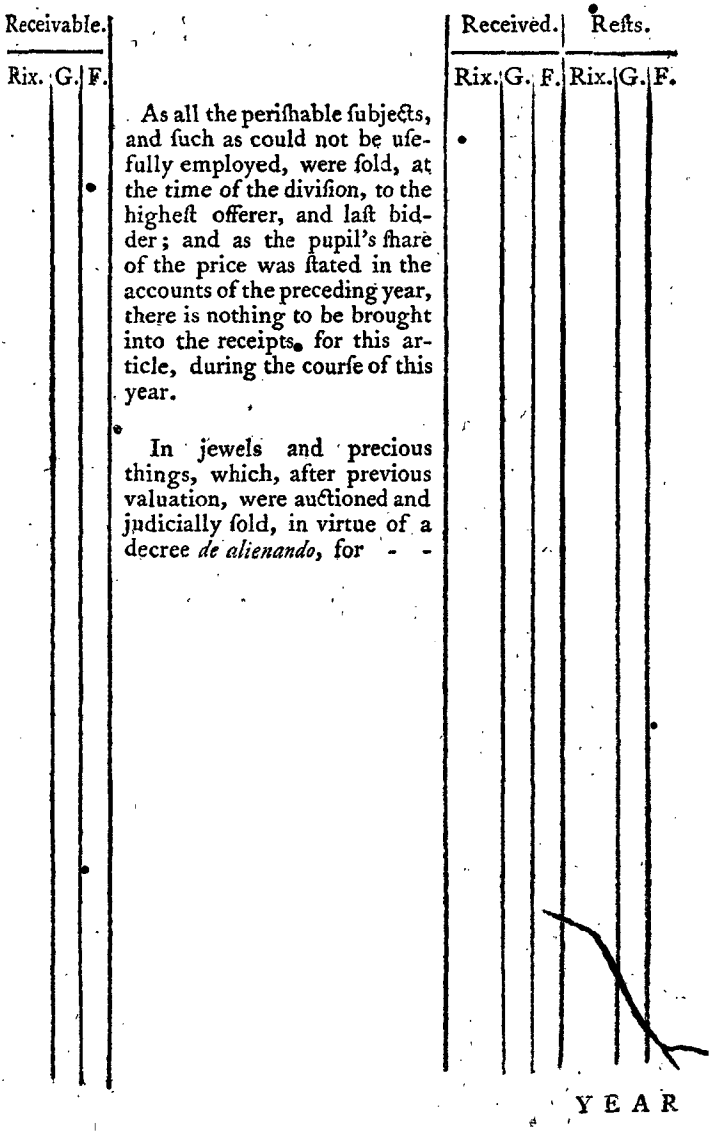
.... Branch of the accountant's receipts of land and houſe rents.



YEAR

YEAR

.... Branch of the accountant's receipts, relating to moveable effects ſold.



YEAR

.... Branch of the accountant's receipts, being receipts in general.

Receivable.				Received.			Refts.		
Rix.	G.	F.		Rix.	G.	F.	Rix.	G.	F.
4			For fifteen deals which remained, when the floor of the garret in the houſe was laid, which were ſold by N. N. the ——— of January ——— for the price mentioned of	4					
			Under this title are comprehended all the articles which do not come in regularly every year; for every thing that comes in regularly, ought to be ſtated in particular branches.						

YEAR

YEAR.

DISBURSEMENTS.

Payable. Rix.	G.	F.		Paid. Rix.	G.	F.	Rests. Rix.	G.	F.
5			Paid, the 10th of April, for the contribution due on account of the fief N. named *Lehnpferd*, and now converted into money for three months, at N. for the pupil's share, No. 1. - - - - - - -				5		
5			Paid on the same account, for three months, the 6th of July, No. 2. - - - - - -				5		
5			Again, on the same account for three months more, the 30th of September, No. 3. - -				5		
5			More for the three last months, the 24th of December, No. 4. - - - - - -				5		
2			For the contribution of a piece of ground, (called *Fandschofs*) in three terms, for the present year, according to the acquittances, No. 5. 6. 7. - -				2		

YEAR

..... Branch of disbursements, being debts payable.
[Which ought to be all particularised.]

Payable.				Paid.			Rests.		
Rix.	G.	F.		Rix.	G.	F.	Rix.	G.	F.
315			a) To N. N. to wit, 300 rix-dollars, capital, and 15 rix-dollars for a year's interest, at five *per cent.*	315					
448			b) To N. N. namely, 400 rix-dollars, capital, and two years interest, at 6 *per cent.*	448					
212			c) To N. N. namely 200 rix-dollars, capital, and 12 rix-dollars for a year's interest, at 6 *per cent.*				212		
			For stated disbursements.						
100			For salary - - - - -	100					
50			For the pupil's board - -	50					
20			For his cloathing, namely, for one suit - - - - - -				20		
8			For school-fees - - -	8					
2			For medicines - - - -				2		
3	16	6	For books - - - - -	3	16	6			
20			To the professor - - -	20					

Payable

Payable.				Paid.			Reſts.		
Rix.	G.	F.		Rix.	G.	F.	Rix.	G.	F.
			If the minor were at his travels, or at the univerſity, inſtead of what is ſtated after board, there would be but one particular branch, under the title of *Branch of diſburſements, on account of expenſes of travelling, and at the academy.*						
50			For expenſe of buildings - -	50					
10			Common diſburſements - -	10					
6			Of charges paid in laying out the capital ſum - - -	6					
1244	16	6		1010	16	6	234		

Rix.	G.	F.		Rix.	G.	F.	Rix.	G.	F.
			After making out the accounts in this manner, a ſummary recapitulation muſt be made at the end of all the branches of receipts and diſburſements, the accounts muſt be cloſed, and the balance of the effects drawn out, and, if there be more expended than was received, the advance ſhall be ſhown: afterward, the accountant ſhall ſign them, marking the day and year in which the accounts were cloſed.						
			After deducting the diſburſements, the balance of the effects is found to amount to what follows:						
			In ready money,						
			In capital ſums laid out,						
			In intereſt, where every thing ſhall be particularized, article by article.						
			In rents, and incomes of immoveable ſubjects, which ſhall in like manner be ſpecified, every one in particular, when there are many of them.						

A

NEW BODY OF LAW.

PART II.

PREFACE.

§ 1.

AFTER having explained, in the firſt part of this work, the firſt object of law, namely, the privileges flowing from the perſonal ſtate and their natural qualities, *(ex ſtatu hominum ſeu ex jure perſonarum)*, we are now, in this ſecond part, to treat of the ſecond object of law, which includes the rights annexed to ſubjects and things themſelves, and to which men conſequently have a real right, *(jus in re)*.

§ 2.

It is ſo much the more difficult to lay down fixed and certain principles with reſpect to what conſtitutes the ſubject of this ſecond part, that, excepting the means of acquiring property by the law of nations, and the ſucceſſion of children to an inteſtate parent, *(de modis acquirendi dominii jure gentium, et de ſucceſſione liberorum ab inteſtato)*; all the reſt is founded rather

rather on civil and politic reaſons, than on reaſons drawn from natural right.

As moſt real rights then depended on the good pleaſure of the Roman legiſlators, inſtead of forming a rational ſyſtem of them, they have ſatisfied themſelves with collecting ſcraps extracted from the works of the moſt celebrated lawyers, and inſerting them, without order or connection, into the body of Roman law. Thence it happened, that it coſt inconceivable trouble to give a juſt form to real rights, which are diſperſed through the whole body of the Roman law, to range them in proper order, to lay down fixed principles, and to clear them from the confuſed interpretations of the modern lawyers, to retrench their vain ſubtilties, to diſpoſe them ſo as to agree with the conſtitution of Germany, and to expreſs all this in the German language.

§ 3.

The ingenious M. *de Loen* was ſo ſenſible, in the pamphlets which he publiſhed, of this confuſed maſs of Roman laws, that he thought it impoſſible to unravel it, unleſs Providence ſhould raiſe up, by a miracle, a ſovereign, who, like a new Alexander, ſhould have reſolution and courage enough to cut the Gordian knot, that is to ſay, to aboliſh the Roman law, and, like another Solomon, have the wiſdom to form a new body of law, whoſe ſtatutes ſhould be all founded on the invariable principles of ſound and pure reaſon.

§ 4.

This miracle has manifeſtly appeared in the dominions ſubject to the King of Pruſſia, in whoſe perſon Providence has given us an Alexander, and a Solomon. This prince, who is above all our praiſes, has cut, like another Alexander, the Gordian knot, which none, till this time, was able to untie, by aboliſhing

oliſhing the Roman laws, which, notwithſtanding their confuſion, continued to be followed in Germany for ſeven hundred years, and, like another Solomon, has cauſed to be compiled a new body of laws, extracted, ſo to ſpeak, from the aſhes of the Roman law, which, in ſeveral articles, did not deviate from the principles of ſound reaſon.

§ 5.

It is proper here to ſhow, in a conciſe manner, wherein the Roman law has been changed, and in what way the ſubject of real rights *(jurium in res)* has been regulated in the preſent body of law, by clearing it from the Roman antiquities and ſubtilties, and ranging it in a natural and rational order.

§ 6.

Firſt is given a conciſe and diſtinct diviſion of things *(rerum diviſiones)*, and every one is referred to its own ſpecies. At the ſame time, it has been ſhown to be unneceſſary to bring into this diviſion things which belong to nobody *(res nullius)*, becauſe, according to the conſtitution of the empire, they belong to the royalties *.

Thereby has been obviated the confuſion which runs through the Roman law, in which are found ſeveral general diviſions †, of which all are incomplete, not to mention that the laws do not agree concerning the ſpecies to which things muſt be referred, placing the ſame thing ſometimes among thoſe which are common, ſometimes among thoſe which are public, by

* See part II.

† Cajus diſtinguiſhes things into thoſe of divine and human right, *in res divini juris et humani juris, L. 2. ff. de reb. div.* He includes, in the firſt, things ſacred, holy, and religious, *res ſacras, ſanctas, et religioſas.* He afterward divides things of human right into public and private *(publicas et privatas)*, and calls the things *public* which belong to nobody, *(res nullius)*.

The

by the law of nations, ſometimes among ſuch as belong to nobody *.

§ 7.

What confuſion may we ſee in the arrangement of real rights in the Roman law? There is not a ſingle kind of real rights treated without interruption, and which is not intermixed with ſeveral ſubjects quite foreign to it, ſo that it was impoſſible to frame a juſt

The Emperor Juſtinian gives a quite different diſtinction. He ſays that things are either out of our heritage, or that they conſtitute a part of it *(extra patrimonium noſtrum et in patrimonio noſtro)*. Among the firſt he puts things common, public, belonging to communities, and ſuch as belong to nobody, *pr. Inſtit. de reb. div.*

Theſe two diviſions are faulty; the firſt becauſe the things which are called, in law, holy and religious *(ſanctæ et religioſæ)*, are included by Cajus in the things of divine right, to which they do not belong. For the things called holy *(ſanctæ)*, ſuch are palaces, markets, public places, are not in the number of thoſe on which ſome particular right has been aſcribed to the Divinity; and as to religious things *(religioſas)*, they are only founded on the ſuperſtition of the Romans, who believed that the ſouls of the departed were deified, and that thoſe ſouls whom they called *dii manes*, never leaving the bodies which they had animated, nor their aſhes, had no reſt, as long as the bodies were deprived of burial, and ſuffered an atrocious injury, as often as the aſhes of the dead were diſturbed.

Theſe two ſpecies of things then are in the number of thoſe which are out of the commerce of particular perſons *(extra commercium ſingulorum)*, not becauſe they are of divine right *(divini juris)*, but becauſe, with reſpect to the firſt, and to hinder their violation, penal laws, or ſanctions *(ſanctiones)*, have been eſtabliſhed againſt ſuch as ſhould happen to violate them, and that tombs have been deſtined by the laws ſolely for burying the dead in them.

Juſtinian's definition is faulty, as it confounds things which belong to different ſpecies. For there is an impropriety in putting things ſacred, holy, and religious, among ſuch as belong to nobody, and, on the contrary, in putting things which belong to nobody *(res nullius)*, and which are called *adeſpota*, among ſuch as are public. Beſides, he calls the ſame thing ſometimes common, ſometimes public, and ſometimes a thing belonging to nobody.

* See the treatiſe intitled, *Grot. illuſt. l. 2. c. 3. § 9. let. p.*

idea

idea of theſe rights, as appears by the remark below *.

It was neceſſary then to propound them in a more proper order; and this has been executed in the preſent body of law with all the exactneſs poſſible, by ranging the ſubject of real rights in a rational order, by giving plain and diſtinct definitions of every ſpecies, and carefully explaining, in every article, the cauſe, the ſubject, the object, the effects, and the methods of putting an end to them, *(cauſam, ſubjectum, objectum, effectus, modos finiendi.)*

§ 8.

In treating of the firſt real right, to wit, of property, *(dominio)*, the natural means of acquiring it are diſtinguiſhed from the civil means, and the firſt are deduced from the principles of natural right, which the ancient Roman lawyers underſtood thoroughly.

With reſpect to the civil means of acquiring the property of a thing, the reaſons have been adduced which engaged the Roman legiſlators to grant the right of civil property to certain affairs or agreements, which, according to natural right, only inferred a perſonal obligation; and as this arrangement of the Ro-

* I. The ſubject of diviſion of things which is the foundation of real rights, is explained in tile VIII. book I.

II. The methods of acquiring property by the law of nations, is treated in title I. of book XLI.

III. Civil properties *(dominia civilia)* are ſo diſperſed in the body of the Roman law, that it is very difficult to collect them. Title III. of book IV. treats of a) Emphyteuſis, copyhold-rights, or long leaſes. b) Title XVIII. of book XLIII. of the rights to a ſurface *(de ſuperficie.)* c) Uſucapion, long poſſeſſion, or preſcription, is handled in title II. of book XLI. d) The Paulian action in title VIII. of book XLII. e) The Publician action, *(de Publiciana in rem actione)*, in title II. of book VI. And,

IV. As to the other kinds of real rights, they are in like manner enumerated without order and without any connection. The ſubject of ſervants is explained in book VIII. and f) that of wages in book XX.

man laws tends to ſhorten law-ſuits, it hath been obſerved in the preſent body of law *.

§ 9.

It is alſo for a reaſon of policy, that the two following real rights, namely, the right of ſervitude, and the right of pledge or mortgage, which, by their own nature, inferred only a perſonal obligation, have been reputed by the Roman legiſlators as real rights, in virtue of which a perſon is intitled to a real action.

Theſe deciſions of the Roman law have been preſerved, becauſe they contribute alſo to prevent the ſhifts which might have been uſed for prolonging law-ſuits, if natural right alone had been followed.

§ 10.

How many ſubtilties with reſpect to Roman antiquities, how many obſolete and ſuperfluous things were to be learned in the univerſities, in order to become acquainted with real rights, of which the juſt notion might have been acquired, independent of all that traſh, provided only they had been reduced into principles?

And indeed there is no reaſon to be ſurpriſed that Juſtinian has appointed a ſpace of five years for ſuch as are to ſtudy law in the univerſities †; on the contrary, if regard be had to the confuſed and unmethodical way in which juriſprudence was taught there, one may be ſurpriſed that he ſhould think youth could form to themſelves a notion of it in the ſpace of five years.

§ 11.

Young perſons muſt then have been at great expenſes in the univerſities, and muſt have loſt much of their time there in learning uſeleſs things. To

* See part II. book III. tit. II.

† See Juſtiniani digeſtorum procœmium de ratione et methodo juris docendi ab anteceſſoribus d. d. 17. Jul. 1533.

have

have a ſample of this, it is ſufficient to conſult the ſubject of the fourth real right concerning ſucceſſions.

What care and trouble is there taken in inſtructing youth in the origin and progreſs of ſucceſſions to perſons inteſtate *? How many treatiſes have been written concerning the origin of wills, and the ſeveral changes which they have undergone †?

* In the univerſities is taught, according to the direction of the Roman law as a thing of great importance; a) That the law of the twelve tables reckons capable of ſucceeding only the heirs which are called one's own, *(ſuos)*, and the legal heirs or agnats, *(legitimos ſeu agnatos)*; b) That afterward daughters were admitted, in ſome meaſure, to their mother's ſucceſſion by the Tertullian decree; and c) That grandſons were declared capable of ſucceeding to their grandmother by the Orphytian decree. In fine, d) Much trouble is taken to ſhow how by little and little other particular ways of ſucceeding were appointed by the laws afterward publiſhed; but; e) As there were ſtill ſeveral perſons excluded from ſucceſſions, they proceeded to ſhow how the pretors remedied that inconveniency, and called to ſucceſſions ſuch as by right of blood *(jure ſanguinis)* might claim them, namely, children emancipated by edict, *Unde liberi*; f) Their own heirs *(ſui)*, when they could not ſucceed in that quality by the edict, *Unde legitimi*. g) All the cognats, according to the order of their degrees, by the edict, *Unde cognati*. h) In fine, perſons joined together by the edict, *Unde vir et uxor*. On this occaſion is explained to youth, i) Why the ſucceſſions conferred by virtue of the Pretorian law, *(hereditas Prætoria)*, are called plainly *bonorum poſſeſſio*. They are alſo taught, k) That this poſſeſſion of effects is either decretal or edictal; l) That the laſt is diſtinguiſhed into ordinary and extraordinary; m) That the extraordinary ſuppoſes the caſe of a perſon dying inteſtate, *(caſum inteſtati)*, (with reſpect to which the edicts have been enumerated), or elſe it ſuppoſes that there is a will made; and, n) That the ordinary edictal poſſeſſion of an eſtate, *(bonorum poſſeſſio edictalis ordinaria)*, takes place in the laſt caſe, either *ſecundum* or *contra tabulas teſtamenti, &c.*

Though, o) Juſtinian has introduced, by his 118th novel, an order of ſucceeding to inteſtate perſons entirely agreeable to reaſon, there was nevertheleſs a neceſſity in the univerſities of being acquainted with theſe uſeleſs and aboliſhed rights, ſo much the rather that ſeveral lawyers have maintained, that the poſſeſſion of eſtates *(bonorum poſſeſſio)* is even at this time of ſome uſe in practice.

† Thomaſius de primis initiis ſucceſſionis teſtamentariæ apud Romanos. Idem de ſenſu legis decemviralis teſtamentariæ.

§ 12.

The King has cut off by the very root all theſe uſeleſs antiquities; ſucceſſions to perſons inteſtate have been regulated according to what reaſon and natural equity required; the three orders of ſucceſſions have been defined in a clear and diſtinct manner; all the doubts which have occurred on this ſubject have been explained and decided; ſo that now one cannot with a ſafe conſcience be ignorant of what is ſignified by the Tertullian and Orphytian decrees, the poſſeſſion of goods, &c. (*S. C. Tertullianum, Orphytianum, Bonorum poſſeſſio.*)

§ 13.

Teſtamentary ſucceſſion wanted ſtill a greater reformation than ſucceſſion to perſons inteſtate. With reſpect to the latter, there needed only to retrench the ancient laws which are no longer of uſe, the Emperor Juſtinian having already ſettled the order of ſucceſſion (*ordines ſucceſſionum*) according to equity, by novel 118. of which the tenor is preſerved in the preſent body of law. But with regard to teſtamentary ſucceſſion, there was a neceſſity to aboliſh private wills, codicils, donations in proſpect of death, tacit ſubſtitutions, the right of accretion, the Falcidian fourth, the Trebellianic fourth, &c. (*privata teſtamenta, codicillos, donationes mortis cauſâ, jus accreſcendi, quartam Falcidiam, Trebellianicam, &c.*)

§ 14.

We muſt own it would have been very advantageous for the public good and the quiet of families, that wills had never been known, and that ſucceſſion had been left to ſuch as nature and reaſon call to it, and who according to the order of families have a natural right to it.

§ 15.

It is indeed an inconteſtable truth, that teſtamentary

tary ſettlements, 1.) Are contrary to reaſon; 2.) That they only occaſion hatred, enmity, and diſſenſions in families; 3.) That for moſt part they are accompanied with fraud, calumny, corruption, &c.; and, 4.) That on account of the many formalities or ſolemnities which the laws require for their completion, and of the ſubtilties which occur in them, they give occaſion to a vaſt number of law-ſuits.

§ 16.

Theſe ſettlements are contrary to the general principles of the law of nature, and imply a real contradiction: for ſuch a ſettlement can be of no avail in the teſtator's lifetime, becauſe the heir neither knew nor accepted it, and that without acceptance a right cannot be acquired by virtue of a ſettlement by another, *(ex diſpoſitione alterius)*. Still leſs can a teſtamentary ſettlement become valid after the teſtator's death; becauſe the right which he had to diſpoſe of what belonged to him ceaſes by his own death, and conſequently there being really no ſettlement, the heir has nothing to accept; other reaſons might ſtill be adduced of this truth, but they have already been amply explained elſewhere *.

§ 17.

Experience ſhows that commonly wills are uſed to deprive, in whole or in part, of their ſucceſſions, thoſe whom nature and the order of families hath called to them, and that conſequently wills occaſion everlaſting enmities in families.

§ 18.

Beſides, how many frauds and cheats are put in practice, when wills are to be made? How much bad uſage has a wife to dread from a covetous and brutal

* Diſſert. procem. ad Grot. illuſtrat. XII. § 296. junct. § 421. ſeq.

huſband,

huſband, if ſhe refuſe to comply with his requeſts, and to make a will to give him her fortune to the prejudice of her own relations?

§ 19.

In like manner, what cannot the careſſes, ſolicitations, plots, tears, and importunities of a cunning wife do, who, ſeeing her huſband dying, takes advantage of his weakneſs of body and mind to extort from him a will, in which the intereſts of her huſband's relations are uſually ſacrificed?

§ 20.

It cannot eſpecially be imagined to how many inconveniencies private wills are ſubject, and how many frauds are committed in them.

We ſhall not cite caſes in which a falſe teſtator has been ſuppoſed, becauſe they are rare, though there be examples of them.

But at leaſt daily experience proves, that for moſt part thoſe wills are made by notaries, procurators, and other idle perſons, whom poverty renders intereſted, and deſirous of gain. There is therefore reaſon to fear that men of that character may uſe colluſion with ſuch as have a plot to get a will made in their own favour, and that they may ſuggeſt to the teſtator what he ought to do in order to favour them: beſides, they may wreſt at their own pleaſure the teſtator's words, and even write things contrary to his intention.

§ 21.

Such ſuggeſtions are ſtill more to be dreaded in the country where deeds of that kind are for moſt part directed by miniſters, who have no knowledge of law, and who, acting from hatred, from paſſion, or from intereſt, induce the poor peaſants, who are ſimple folks, to make wills to the prejudice of their children, of their ſpouſes, and other relations, often taking advantage of the opportunity to extort from

them

them donations to churches, and ſuch as miniſter in them.

§ 22.

It is beſides inconteſtable, that private wills are the ſource of many law-ſuits. The reaſon of this is, that the laws have preſcribed the obſervation of ſo many formalities with reſpect to the different kinds of wills, and there are ſo many niceties made neceſſary, that the leaſt omiſſion occaſions a law-ſuit. This is the more likely to happen, that moſt wills, as has been juſt obſerved, are drawn up, and directed by notaries, procurators, miniſters, and people of no reputation, who are equally ignorant of the laws.

§ 23.

Thoſe people imagine, that it is very eaſy to make or draw up a will, and that it is ſufficient to know what are the formalities requiſite, both for the interior and exterior of ſuch a writing, *&c.*; though the principal matter be to have a right knowledge of the things and rights themſelves with reſpect to which the teſtator intends to make a ſettlement.

One who intends to give any direction for drawing up a will, ought principally to know who they are who are capable of making a will; what perſons may be appointed heirs; what a ſubſtitution is, and in what it differs from a feoffment in truſt. The ſingle article, for example, of ſubſtitutions and feoffments in truſt has occaſioned many law-ſuits to decide the queſtion, whether the teſtator intended to make a ſubſtitution, or only a feoffment in truſt. Nevertheleſs, ſuch as intermeddle in making wills do not underſtand the perplexed ſubject of the collation or communication of effects, and cannot inform the teſtator of it, nor when he makes legacies, explain to him what is to be underſtood by thoſe of alimony, of proviſion, of furniture, of ſubjects fitted up or furniſhed, of choice, *&c.*

(*generis*,

(*generis, quantitatis, optionis.*) How alſo can ſuch a man who is ignorant of the law diſtinguiſh when the teſtator has aſſigned a piece of ground, or other place, whence the legiſlator is to draw his legacy, if it was added *taxationis* or *demonſtrationis gratiâ*; which, however, muſt be diſtinguiſhed, to prevent for the future any difference on that head?

§ 24.

Civil ſocieties ſubſiſted for ſo many years without wills, that they might very well have continued without them. According to the teſtimony of Ariſtotle, wills were unknown in his time in moſt countries *; which Tacitus aſſures us in particular of the Germans †.

Plutarch tells us, that Solon was the firſt who introduced the uſe of wills into Greece ‡: from the Greeks it paſſed with the law of the twelve tables to the Romans; and in the thirteenth century wills were received with the body of the Roman law into Germany and the neighbouring kingdoms.

It is beſides certain, that even at this time, in all the nations governed by the ſole light of reaſon, and who are unacquainted with the Roman laws, there is not the leaſt trace of ſettlements which have their force and validity only after death.

§ 25.

For this reaſon, many ancient and able lawyers have maintained, not without foundation, that wills were pernicious to ſociety, by cauſing the ruin of families, and occaſioning a multitude of law-ſuits. Thence they have rationally concluded, that it would be very proper to baniſh them from ſociety. On this ſubject

* Ariſtot. polit. lib. 5. cap. 8. ad fin. et *Hubert Giphan* in comment. ad eund. ſcribit, *Apud pleraſque gentes olim nullum fuiſſe teſtamentorum uſum.*

† Tacit. de mor. Germ. c. 20.

‡ Struv. ſynt. jur. civil. tit. Qui teſt. fac. poſſ. § 3. ibique Müller.

ſee

ſee the works of Boerius, Argentreus, Bodinus, Tiraqueau, and other lawyers *.

Such as have taken the ſide of wills, have nevertheleſs regarded, with reaſon, the matter of ſubſtitutions, as extremely perplexed, difficult, and intermixed with ſo many niceties, that there is no getting them unravelled.

Some even have pretended, that it was of no uſe in practice, or at leaſt of very little, and that therefore it was not neceſſary to inſiſt upon it †.

It cannot indeed be diſowned but there occur on the ſubject of ſubſtitutions ſo many doubtful and nice queſtions, that they afford a thouſand opportunities to advocates to engage the ſubjects in law-ſuits, and to ruin whole families ‡.

Baldus the lawyer is a very convincing proof of this; for it is aſſured, that he boaſted of having gained, by his counſels on this ſingle ſubject, fifteen thouſand ducats ‖.

* Müller ad Struv, tit. d. l. § 3. lit. 8.

† Ibid. tit. de vulg. ſubſt. § 9. lit. n. et § 37.

‡ It is not without foundation that it is pretended that the ſubject of ſubſtitutions is full of niceties, and liable to inſurmountable difficulties. 1.] There are ſeveral ſorts of ſubſtitutions, of which each has its conditions, *(requiſita)*, and its form, *(formulam)*, namely, a) the vulgar; b) the pupillary; c) the almoſt pupillary; and, d) the military. 2] There has been much diſpute to know whether theſe ſubſtitutions are tacitly included in one another; that is to ſay, whether when one has been expreſſed, the others are tacitly to be underſtood. 3.] It has alſo been aſked, whether a mother can ſubſtitute in this manner. And, 4.] Whether the teſtator can in a pupillary and almoſt-pupillary will paſs by *(præterire)* the mother of a pupil, or of one who cannot make a will, or if he can diſinherit her without cauſe. 5.] In like manner the queſtion has been toſſed, whether a will in which there is a ſubſtitution to a pupil, or to one incapable of making a will, makes only one teſtament, one ſucceſſion, or whether it makes two, and what are the effects reſulting from it.

‖ Müller. dict. lit. n.

§ 26.

Nevertheleſs, as the right of making a will is regarded, in moſt countries of Chriſtendom, as an advantage very precious to the ſubjects, and that moſt men would think themſelves very harſhly treated, were they put under the neceſſity of leaving inteſtate their fortune, earned by the ſweat of their brows, to children or relations who are manifeſtly unworthy of it; it cannot be denied but equity itſelf, in ſome meaſure, requires, that every one be left at liberty to gratify a child who gives all manner of ſatisfaction; to exclude from their ſucceſſion ſuch of their relations as, by their ill behaviour, do not deſerve to have a ſhare in it; to leave tokens of their remembrance to ſuch as, during their life, have ſhown kindneſs to them, or have ſerved them faithfully; and, in fine, to make ſubſtitutions and feoffments in truſt, for the preſervation of their families.

§ 27.

It was a reaſon of equity which induced us to ſuffer wills and ſubſtitutions to ſubſiſt; but they are confined within ſo narrow limits, that it is ſcarcely to be dreaded that any fraud can creep into them, and far leſs that any great law-ſuits can ariſe from them.

§ 28.

For, in the firſt place, all private wills which demanded the preſence of ſeven witneſſes; are entirely aboliſhed; alſo all private codicils and donations in proſpect of death, which are an amphibious ſpecies between teſtamentary ſettlements and deeds taking place while perſons are alive; and it has been laid down as an invariable and perpetual rule, that teſtamentary ſettlements can, for the future, only be made judicially.

By this means, we ſhall have no more apprehenſions, in teſtamentary ſettlements, of the ignorance, ſuggeſtions,

ſuggeſtions, corruption, and other frauds of notaries, attorneys, and other rogues; which will prevent a great many law-ſuits.

§ 29.

In the ſecond place, there is no mention in the preſent body of law, of the wills, which, according to the Roman law, might be offered to the prince; becauſe this method of making wills is liable to many inconveniencies, and the King does not think proper to enter into that ſort of private affairs.

§ 30.

In the third place, the formalities to be required in drawing up ſuch a judicial will are ſo clearly explained, that it will not be eaſy to be guilty of an error in it which can render the deed null.

With this view it was ordained, after mature deliberation, that, if the judges neglect things which occaſion a will to be annulled, they ſhall be bound, jointly and ſeverally, to indemnify all thoſe in whoſe favour the teſtator had made his ſettlement, and, beſides, they ſhall be diſmiſſed from their office.

§ 31.

In the fourth place, we have aboliſhed, as an uſeleſs nicety which occaſions many difficulties, the rule, that a man cannot die *pro parte teſtatus, pro parte inteſtatus*. See part II. book VII. tit. IV. art. I. § 11. And, in the caſe where acceſſion to the inheritance is neceſſary for the preſervation of the legacies, it has been decreed, that the ſucceſſion ſhould be, by law, preſumed as accepted, *(pro adita)*. See part II. book VIII. tit. II. § 62.

§ 32.

In the fifth place, the doubtful queſtions with reſpect to ſubſtitutions are decided; and, regard-

ing all tacit ſubſtitutions as uſeleſs niceties, they are aboliſhed.

§ 33.

In the ſixth place, the right of accretion, and the Falcidian and Trebellianic fourths, as ſo many ſources of law-ſuits, are likewiſe aboliſhed.

§ 34.

In the ſeventh place, privileged wills are explained with very particular care, and it is ſhown plainly in what their privilege conſiſts. The number of theſe wills is likewiſe fixed.

§ 35.

In the eighth place, the affair of legacies is properly arranged, which is ſo difficult, and ſo confuſed in the Roman law. Doubtful queſtions are reſolved, and, above all, we have carefully explained what muſt be underſtood by the general denominations of certain things.

§ 36.

We have then been diligent to complete the King's plan, and to execute the juſt and ſalutary views which he had propoſed, by ordaining that one certain and evident law ſhould be eſtabliſhed, that every opportunity of chicane ſhould be taken from advocates, and that the felicity ſhould be procured for his ſubjects, which they have ſo long ardently deſired, and after which the neighbouring ſtates ſtill ſigh in vain.

§ 37.

In fine, it was thought neceſſary to add here a plan or ſummary of real rights, *(jurium in re)*, to ſhow the order in which they are laid down in this body of law.

PLAN or SUMMARY of PART II.

BOOK I.

§ 1. AFTER having explained, in the firſt part, the rights and privileges flowing from the perſonal ſtate, *(ex ſtatu hominum)*, real rights *(jura in re)* ſhall be explained in this ſecond part.

§ 2. In Title II. we ſhall treat of the nature of things and their diviſion; in particular of the diviſion of things, which are either within the property of particular perſons, or out of their property, *(de rerum diviſione, et in ſpecie de diviſione rerum quæ ſunt vel extra patrimonium ſingulorum vel in patrimonio ſingulorum.)*

§ 3. In title III. ſhall be explained the other diviſions of things, into moveable and immoveable, corporeal and incorporeal.

BOOK II.

§ 1. Having explained, in the preceding book, the nature of things in general, and their different kinds and diviſions, in title II. we ſhall treat of real rights in general, *(de juribus in re in genere)*, whoſe number the laws have fixed to theſe four, namely, property, ſervitude, pledge, and ſucceſſion, *(dominium, ſervitus, pignus, et hereditas.)*

§ 2. In title III. we ſhall treat of the firſt real right, namely, of property; and its definition ſhall be given, its cauſe, its diviſions, its ſubject, its object, and, in fine, the means by which an end is put to it ſhall be enumerated, *(definitionem, cauſam, diviſiones, ſubjectum, objectum, et modos finiendi.)*

§ 3. In title IV. we ſhall treat of the effects of property, and, in particular, of the actions which reſult from it, namely,

Of claim of right or challenge, art. I.

Of the action of exhibition, *ad exhibendum*, art. II.

Of the action of diviſion of commons, *communi dividundo*, art. III.

§ 4. In title V. ſhall be explained the methods of acquiring by the law of nations, *(modos acquirendi jure gentium)*, referring to treat, in the following book, of the methods of acquiring by the civil law, *(de modo acquirendi jure civili.)*

BOOK

BOOK III.

§ 1. Beſide the natural methods of acquiring property, mentioned in the preceding book, the civil laws have introduced others, it being found that it was proper and neceſſary, on account of certain circumſtances, to grant to poſſeſſors a kind of property, or other real right: though, according to the law of nature, they had only a perſonal right.

§ 2. In title II. we ſhall treat of the origin of civil properties, and other real rights.

§ 3. In title III. of the method of acquiring civil or uſeful property by means of an *emphyteuſis*, feu, or long leaſe, *(de emphyteoſi.)*

§ 4. In title IV. of the right to a ſurface *(de ſuperficie)*, and of the civil or uſeful property which reſults from it.

§ 5. In title V. of the manner of acquiring civil property by preſcription, *(de uſucapione et præſcriptione)*.

§ 6. In title VI. ſhall be explained how creditors acquire the civil property of things which the debtor alienates fraudulently to their prejudice, and which, for that reaſon, may be redemanded from the poſſeſſor who had a ſhare in the fraud, *(de actione Pauliana.)*

§ 7. In title VII. ſhall be ſhown how a perſon, who, not being proprietor of a thing, is nevertheleſs in a way, and has a right to preſcribe it, is reckoned civil proprietor, *(pro domino civili)*, ſo that he may, when he comes to take poſſeſſion of it, redemand the thing from all ſuch as have a leſs title to poſſeſs it than his own, *(de Publiciana in rem actione)*.

§ 8. In title VIII. ſhall be ſhown in what manner, according to the civil laws, property is acquired alſo by an inveſtiture, by delivery or tradition of the portion, by a will and other teſtamentary deed, or for ſeveral cauſes.

BOOK IV.

§ 1. After having treated, in the preceding book, of the firſt real right, to wit, of property and the means of acquiring it, we muſt treat, in this fourth book, of the ſecond real right, namely, of ſervitude, the nature of which ſhall be explained in general in title II.

§ 2. In title III. we ſhall treat of the firſt perſonal ſervitude, namely, of uſufruct, and, in particular, of real uſufruct, *(de vero uſufructu)*, which takes place when the uſufruct, or liferent, is given of a thing, which can be enjoyed without its periſhing by the uſe made of it, *(ſalvâ ſubſtantiâ rei.)*

§ 3. In title IV. we ſhall treat of the ſuppoſed uſufruct, *(de quaſi uſufructu)*.

uſufructu), which takes place, when the uſufruct or liferent is given of a thing which is conſumed by the uſe made of it.

§ 4. And as the uſufructuary or liferenter is bound to give ſecurity, in title V. ſhall be ſhown in what that ſecurity conſiſts, and in what manner it is to be given.

§ 5. In title VI. we ſhall treat of the day on which an uſufruct begins, and operates a real right in favour of the uſufructuary.

§ 6. In title VII. the actions reſulting from uſufruct ſhall be pointed out.

§ 7. In title VIII. we ſhall treat of the ſecond perſonal ſervitude, namely, of uſe, *(de ſervitute uſûs.)*

§ 8. And, in title IX. of the third perſonal ſervitude, namely, of inhabitation, *(de ſervitute habitationis.)*

§ 9. In title X. ſhall be treated in general real ſervitudes, or ſuch as are conſtituted for the advantage of lands or heritages, *(de ſervitutibus prædialibus in genere)*, and in particular,

In article I. of ſervitudes due to edifices or heritages in towns, *(de ſervitutibus prædiorum urbanorum.)*

And in article II. of ſervitudes in the country, *(de ſervitutibus prædiorum ruſticorum.)*

§ 10. In title XI. ſhall be explained the nature of the actions which the laws allow, both to ſuch as maintain that a right of ſervitude is due to them, and claim it, and to ſuch as deny that it is due.

§ 11. In fine, in title XII. ſhall be treated the means by which ſervitudes come to an end.

BOOK V.

§ 1. After having treated of the two firſt real rights, namely, of property and of ſervitudes, in book V. we ſhall treat of the third real right, namely, of pledge, and of hypothec or mortgage.

§ 2. In title II. ſhall be ſeen what a pledge, hypothec, or mortgage is; how they are divided; in what manner they are conſtituted; and the effects they produce.

§ 3. In title III. ſhall be mentioned tacit pledges, and hypothecs or mortgages, and the caſes in which theſe hypothecs or mortgages take place.

§ 4. In title IV. ſhall be ſhown on what things a pledge or mortgage may be conſtituted.

§ 5. In title V. we ſhall mention by a reference of the property of pledges, and hypothecs or mortgages; and, in title VI. ſhall be ſhown how to proceed in their alienation, when the debtor does not pay what he owes.

§ 6. In title VII. we ſhall treat of the method of extinguiſhing rights of pledge, hypothec or mortgage.

BOOK

BOOK VI.

§ 1. In the number of real rights are put ſucceſſions to perſons inteſtate, and teſtamentary ſucceſſions.

§ 2. In title II. then we ſhall treat of the fourth real right which is acquired by means of ſucceſſion, *(jure hereditatis)*, and of the origin of ſucceſſions in general.

§ 3. In title III. ſhall be explained the order in which deſcendants ſucceed to perſons inteſtate.

§ 4. In title IV. the order in which aſcendants ſucceed to perſons inteſtate.

§ 5. And in title V. the order in which collaterals ſucceed to perſons inteſtate.

§ 6. In title VI. ſhall be ſhown in what caſe a widow ſucceeds to her huſband inteſtate, in virtue of a right peculiar to herſelf, *(proprio jure)*. And,

§ 7. In title VII. when ſucceſſions to perſons inteſtate fall to the receipt of exchequer or treaſury.

BOOK VII.

§ 1. In the preceding book we have ſeen how a real right is acquired by means of ſucceſſions to perſons inteſtate, and that ſuch acquiſition is founded on reaſon and equity. This ſeventh book ſhall ſhow how a real right is acquired by the method of teſtamentary ſucceſſion; a method of acquiſition which owes its origin to civil laws.

§ 2. In title II. we ſhall treat of wills in general.

§ 3. Of the exterior ſolemnities requiſite to the making of a will.

§ 4. And in title IV. of the interior ſolemnities of a will, to wit, the appointing of an heir, and, in particular, of thoſe of children and aſcendants, (*de inſtitutione heredum, et ſpeciatim liberorum et parentum.*)

§ 5. In title V. we ſhall treat of the diſinheriting of children, and of that of parents.

§ 6. In title VI. ſhall be ſhown how children and parents diſinherited, may impugn a will as undutiful, *(per querelam inofficioſi teſtamenti)*, and at the ſame time ſhall be explained the ſubject of a legitim.

§ 7. In title VII. we ſhall treat of the appointment of ſecond heirs; that is to ſay, of ſubſtitutions both vulgar and pupillary, (*de ſubſtitutione tum vulgari tum pupillari.*)

§ 8. In title VIII. of ſucceſſions by feoffment in truſt, (*de fideicommiſſaria hereditate.*)

§ 9. In title IX. of reciprocal wills between huſband and wife.

§ 10. In title X. of conventional ſucceſſions.

§ 11.

§ 11. In title XI. ſhall be explained the nature of privileged wills; and there we ſhall treat, 1.) Of military wills; 2.) Of the wills of parents among their children; and, 3.) Of wills made in time of peſtilence.

§ 12. In title XII. ſhall be declared, that codicils ſhall be ineffectual, if not made judicially, (*de codicillis et clauſula codicillari.*)

§ 13. And as teſtators may annex conditions to their ſettlements, in title XIII. we ſhall treat of the conditions under which teſtamentary ſettlements are made, *(de conditionibus inſtitutionum.)*

§ 14. In title XIV. we ſhall treat of the ſolemnities requiſite at the opening of wills, *(teſtamenta quemadmodum aperiantur.)*

§ 15. And in title XV. of the entering upon, or acceſſion to the inheritance, and of the means by which it is loſt; alſo of the right of deliberating, and of the benefit of inventory.

§ 16. In title XVI. ſhall be ſhown what children ought to contribute or communicate to the ſucceſſion, *(de collatione et dotis collatione.)*

§ 17. And in title XVII. how wills are annulled and invalidated.

§ 18. When a ſucceſſion is diſputed or retained from an heir, which fell to him either by a perſon dying inteſtate, or by will, he is intitled to the action called *petitio hereditatis*, of which an explanation ſhall be given in title XVIII.

§ 19. And if the queſtion be not concerning the ſucceſſion itſelf, but concerning the diviſion or ſome part of the ſucceſſion, he is intitled to the action *familiæ erciſcundæ*, of which we ſhall treat in title XIX.

BOOK VIII.

§ 1. After having, in the preceding book, handled the ſubject of wills, follows that of legacies, which cannot be left but in a will.

§ 2. In title II. ſhall be ſhown what legacies are in general, and how they are left, *(de legatis.)*

§ 3. In title III. we ſhall treat of annual legacies and their effect.

§ 4. In title IV. ſhall be ſhown what is comprehended in perſonal ſervitudes.

§ 5. In title V. what belongs to a legacy of real ſervitudes, or ſuch as are made for the benefit of heritages.

§ 6. In title VI. how a huſband may leave to his wife, by way of preſent, the portion which he received from her, *(de dote prælegata.)*

§ 7. In title VII. how a teſtator may, by a legacy, diſcharge his debtor of what he owes him, *(de liberatione legata.)*

§ 8. And in title VIII. what is the effect of a legacy, when the choice or option is left to the legatary, *(de optione et electione legata.)*

§ 9. In title IX. we ſhall treat of a legacy of a land-eſtate or fortune in the country fitted up; of its inventory, and what is comprehended in it.

§ 10. In title X. ſhall be explained what is to be underſtood by a legacy of *gold, ſilver, money, ornaments*, and *cloaths*.

§ 11. In title XI. what is to be underſtood by a legacy of furniture and utenſils, *(per ſupellectilem.)*

§ 12. In title XII. what is included in a legacy of proviſions.

§ 13. In title XIII. what is to be underſtood by a legacy of corn, wine, and oil.

§ 14. In title XIV. what is to be underſtood by a legacy of maintenance or alimony, *(alimenta)*, and by that of meat and drink, *(cibaria)*, and what is included in it.

§ 15. In title XV. what is to be underſtood by the legacy of a *peculium*, peculiar or ſtock, which a father makes for his children, and in what ſuch a legacy conſiſts.

§ 16. In title XVI. we ſhall treat of the conditions and other clauſes which teſtators may inſert in their ſettlements, *(de conditionibus, demonſtrationibus, cauſis, et modis.)*

§ 17. And as it is neceſſary to know when and from what time a legatary has right to his legacy, that ſubject ſhall be explained in title XVII. *(quando dies legati cedat.)*

§ 18. It alſo frequently happens that a legacy is not to be paid till ſome time after, and, in the mean while, it is proper to give for that purpoſe ſurety to the legatary; wherefore, in title XVIII. we ſhall treat of the ſecurity which an heir ſhall give to a legatary on ſuch occaſions, *(ut legatorum nomine caveatur.)*

§ 19. In fine, in title XIX. ſhall be ſhown how legacies ceaſe to take place, or are annulled and invalidated; which happens, 1.) When the teſtator revokes the legacy which he has left, art. I. 2.) When the legacy itſelf happens to ceaſe, art. II. 3.) When the teſtator's ſettlement is doubtful, art. III. 4.) When the legacy is null by law, art. IV. 5.) When a legacy is reckoned as not written, *(pro non ſcripto)*, art. V. 6.) When the legatary is deprived of his legacy, becauſe he rendered himſelf unworthy of it, art. VI. 7.) When the teſtator has been guilty of an error, either with regard to the perſon of the legatary, or with regard to the thing left in legacy.

PART

PART II. BOOK I.

TITLE I.

Subject of the firſt book.

§ 1.

IN the firſt part of this body of law we have laid down in general as a principle, that juſtice conſiſted in giving every one his own; that is to ſay, what belongs to him of right. See part I. book I. tit. III. § 1.

§ 2.

We have moreover determined what muſt be underſtood by theſe words, *his own*, and *what belongs to him of right*, by ſhowing, that all the rights and privileges which are due to mankind flow from three principal ſources, namely, 1.) From the perſonal ſtate; 2.) From a right in the things; and, 3.) From a perſonal obligation, *ibid.* § 2.

§ 3.

In the firſt part we have explained the rights which are due to mankind by virtue of their ſtate, and of the quality annexed to their perſons; and that is the firſt object of law.

§ 4.

We are now to treat in this ſecond part of the rights which mankind have in things, by virtue of a real right, *(jus in re.)* This right is called *real*, in ſo far as it affects the thing itſelf; ſo that one who has a real right in a thing, may diſpoſe of it at pleaſure,

and redemand it from all ſuch as are in poſſeſſion of it: and that is the ſecond object of law.

§ 5.

Before proceeding to the examination of real rights, we have begun with defining, in title II. what muſt be underſtood by things, (*res*), and into how many different ſpecies it is cuſtomary to divide them, (*de rerum diviſione.*)

And as all things are divided into ſuch as belong to us, and ſuch as do not, we ſhall begin by thoſe of the laſt order, (*extra patrimonium ſingulorum*); becauſe, after having determined the things which do not conſtitute a part of any particular property, all the others are to be eſteemed to belong to the property of particular perſons, (*in patrimonio ſingulorum.*)

We ſhall treat then,

In article I. of things ſacred.

In article II. of things religious.

In article III. of things holy.

In article IV. of things common and public by the law of nations.

In article V. of things belonging to a community.

In article VI. of things which have no maſter, and which belong to nobody.

§ 6.

In title III. ſhall be explained other diviſions of things, namely, thoſe which diſtinguiſh them, 1.) Into moveable and immoveable, (*in res mobiles et immobiles*); and, 2.) Into things corporeal and incorporeal, (*in res corporales et incorporales.*)

TITLE

TITLE II.

Of things and their diviſion.

(De rerum diviſione.)

§ 1.

BEfore explaining real rights, it is neceſſary to ſhow, what is underſtood by *things*, and how they are diſtinguiſhed, as this difference is the foundation of different rights.

§ 2.

We underſtand by *things* all the effects from which mankind can draw any uſe or benefit. In them are alſo comprehended all the advantages ariſing from them, ſuch as fruits, intereſts, *&c.* as alſo the obligations, actions, and other rights annexed to them.

§ 3.

All the things deſtined to the uſe of man are of two ſorts. There are ſome which do not belong to the fortune and property of particular perſons, and for that reaſon particular perſons have no right in them, *(extra patrimonium ſingulorum)*. There are others, which conſtitute a part of that property, and which belong to the effects and means of particular perſons, *(in patrimonio ſingulorum.)*

§ 4.

The things not within the property of particular perſons, and which conſequently do not conſtitute a part of their effects, are,

1.) Things conſecrated to God, which are called ſacred, *(res ſacræ)*. See art. I.

2.) Things

2.) Things deſtined for the uſe of the dead, and which are called religious, *(res religioſæ)*. See art.

3.) Things which are conſtantly deſtined to public uſe, and the abuſe of which is prohibited under grievous penalties by the laws which are called *pœnales*. They are called things holy, *(res ſanctæ)*. See art. III.

4.) Things which are of a nature not to be acquired by a real right, and of which, conſequently, the uſe is common to all mankind. They are called things common, *(res communes)*. See art. IV.

5.) Things of which the property belongs to a whole nation, or to a whole community, and the uſe to all ſuch as conſtitute a part of it, *(res publicæ et univerſitatis)*. See art. V.

6.) Things which have no maſter, and which conſequently are neither in the power, nor keeping of any one, but of which an acquiſition may, nevertheleſs, be made. They are called things which belong to nobody, *(res nullius)*. See art. VI.

Things ſacred, religious, and holy, are comprehended in the Roman laws under what they call divine right, *(res divini juris)*, and the reſt are of human right, *(res humani juris)*. Of each of theſe things we ſhall treat in particular.

ART. I.

Of things ſacred.

(De rebus ſacris.)

§ 5.

THings ſacred are ſuch as are deſtined immediately to divine worſhip, and conſecrated to that uſe, either by the ſovereign himſelf, or by conſiſtories, by virtue of the orders which they have received from him.

him. Such are churches, chapels, altars, cups, and other veſſels. All theſe things acquire the quality of things ſacred, from the very moment of their conſecration.

§ 6.

No private perſon is allowed to conſecrate ſuch things, nor conſequently to erect churches, chapels, altars, *&c.* without the ſovereign's permiſſion.

§ 7.

Things ſacred are out of the commerce of mankind; and as they are not the property of particular perſons, they are alſo called things which belong to nobody, *(res nullius.)*

They can then neither be alienated nor pledged, nor left in legacy, nor ſubjected to a right of ſervitude.

Thence it follows, that, if any perſon ſhould undertake to diſpoſe of a thing ſacred, the diſpoſition would be null in law; ſo that one could not demand, by virtue of ſuch an engagement, either the price or penalty ſtipulated in caſe of contravention; and even though the thing ſhould ceaſe to be ſacred, the diſpoſition would remain without force or effect.

Neither can feaſts be given in temples, nor meetings of that nature held there.

It is not even allowable to make changes in places conſecrated to divine ſervice, nor to build there without authority, even though what was intended to be changed ſhould regard only pure ornaments.

But acts of voluntary juriſdiction may be paſſed there, which are founded on piety and honeſty; ſuch as agreements, eſpouſals, the appointment of a guardian, *&c.*

When a thing common to ſeveral perſons comes to be conſecrated, the ſociety which ſubſiſted with reſpect to it is immediately thereby diſſolved.

Things

Things ſacred enjoy the privilege of the perſons called poor, calamitous, or unfortunate, *(privilegium miſerabilium perſonarum)*. As to the right of aſylum, or ſanctuary, thereto annexed in ſome places, with reſpect to criminals who take refuge there, it is an abuſe which has long ago been aboliſhed in our dominions.

§ 8.

The laws have granted ſeveral actions for the ſecurity of conſecrated places.

1.) When they are violated, or any thing carried off from them, the public crime of ſacrilege is committed, of which every one has a right to proſecute the puniſhment.

2.) When any one depoſits any thing in a conſecrated place, raiſes buildings, or makes any other alteration which disfigure or incommode the place, every private perſon may intent againſt the delinquent the action called *interdictum ne quid in loco ſacro fiat*, and demand that he be prohibited to do the like, or to finiſh what he has begun; and alſo that he be injoined to take away, or carry off, what he has already done, and to put things again into their former ſtate, reimburſing all the coſts, damages, and intereſts. This interdict or action takes place, even though the perſon who had built or made alterations had renounced any bad intention *(dolum malum)*, in the poſſeſſion of the work which he had done.

But that does not hinder the poſſeſſor of that work, or of the thing depoſited in thoſe places, from being obliged to carry off, or take away, what has been done or depoſited, and to reſtore every thing to its firſt ſtate, reſerving to himſelf recourſe againſt his author.

In fine, 3.) Offences ſaid or done in ſacred places, are reckoned atrocious, and puniſhed for that reaſon more ſeverely.

§ 9.

§ 9.

From things ſacred muſt be carefully diſtinguiſhed things called eccleſiaſtical effects, (*res eccleſiaſticæ*), which are not dedicated to divine worſhip, but belong to churches, to which they have been given for founding, endowing, or ſupporting them. This ſort of effects may be alienated with the conſent of the churches, and of ſuch as are intereſted in them, when there are valid reaſons for diſpoſing of them, and their price is employed for the advantage of the church. If they be immoveable ſubjects, the conſiſtory muſt give its conſent. Moreover, it is neceſſary that a formal deed be drawn up, of the method of proceeding to the alienation; which ſhall alſo be obſerved with regard to orphan-houſes, hoſpitals, and all pious foundations.

§ 10.

Things conſecrated to God loſe the quality of things ſacred,

1.) When the ſovereign's right, who hath conſecrated the thing, happens to ceaſe: wherefore temples which fall into the hands of an enemy, ceaſe to be ſacred.

2.) When one who has the right of conſecration ſecularizes them; that is to ſay, when he declares they ſhall no longer be ſacred, and deſtines them to temporal or civil uſes.

3.) When a thing ſacred happens to periſh. For example, when ſacred cups are ſo bruiſed or damaged that they can no longer be uſed. But, with reſpect to temples, though they be not preached in, or though they fall ruinous, the place nevertheleſs is ſacred, and it is not allowable to take any thing out of it.

In fine, it muſt be obſerved that things ſacred can never be acquired by preſcription.

ART. II.

Of things deſtined for the uſe of the dead, and which are called religious.

(De rebus religioſis.)

§ 11.

IN the ſecond place, are put in the number of things which are not the inheritance of particular perſons, *(extra patrimonium ſingulorum)*, and to which no private perſon conſequently can acquire a right of property, things religious, that is to ſay, tombs where the bodies of the dead are depoſited.

§ 12.

We ſuppoſe, that there is in general a neceſſity and obligation to inter dead bodies in places deſtined for their burial, to remove them from the injuries of animals, and to make a diſtinction between the body of man, who is the image of the Deity, and the carcaſes of brute beaſts.

§ 13.

From this advantage are excluded,

1.) Such as have been put to death for capital crimes, whoſe bodies remain publicly expoſed on the ſtreet, or ground, or are thrown out on a lay-ſtall.

2.) In the ſecond place are excluded criminals, who, being condemned to death for capital crimes, of which they were convicted, or which they themſelves owned either voluntarily or on torture, prevent the execution of their ſentence, by taking away their life in priſon.

Our will is, however, that, in ſuch caſes, the judge who

who ſhall draw up the ſentence, expreſs always the manner in which the dead body is to be uſed.

3.) As to ſuch as are not of any of the three religions received in the empire, it appears to us unjuſt and unchriſtian, to leave them without burial, or to cauſe them to be interred in places where only the infamous are put. Wherefore our will is, that their bodies, without excepting even thoſe of the Pagans, who ſhall happen to die in our dominions, be interred in ſome place of the cemetery which ſhall be reſerved for that purpoſe; but it ſhall not be allowable to inter them with the uſual ſolemnities, ſuch as the ringing of bells, ſinging of pſalms and hymns, *&c.*

The ſame ſhall be the practice with reſpect to the bodies of perſons who ſhall take away their own lives through melancholy, or in the delirious fits with which diſeaſes are ſometimes attended.

In fine, 4) The obligation of interring the dead is not extended to monſters, who have neither the human ſhape nor underſtanding; nor to moles or maſſes of blood *(moles ſeu maſſæ ſanguinis)*, which it is ſufficient only to cover with earth.

§ 14.

Circumſtances often happen, in which committing the dead to the earth muſt abſolutely be deferred. For example,

1.) When a known man dies ſuddenly, and there are circumſtances found in his death, which render it ſuſpected; as alſo, when a man is found either on a high road, or in the water, eſpecially if there be tokens which may induce to believe that his death was violent, *&c.* In theſe caſes, the judge of the place ſhall immediately be informed, who ſhall endeavour to diſcover, by an examination of all the circumſtances, whether there be any token that the perſon has taken poiſon, or made an attempt on his own life;

or whether his death were only the effect of diſeaſe and melancholy, or whether there be ground to believe that any violence was done againſt the defunct. If any wound or hurt be obſerved on the dead body, a ſurgeon or phyſician ſhall be called, if there be one in the neighbourhood, to be preſent at the inſpection and opening of the body. They ſhall examine whether the wound were mortal, and the judge ſhall make all the neceſſary inquiries to diſcover the perpetrator of the murder.

After all theſe formalities have been obſerved, ſuppoſing no ſuſpected circumſtance occur, the body ſhall be interred privately.

2.) When ſuch as are found any where dead are ſtrangers and unknown, they cannot be interred till the judge of the place be informed; who ſhall begin by acquainting the public, in the weekly news or gazette, of all the circumſtances which may make the defunct to be known, ſuch as thoſe of age, ſex, figure, cloathing, &c.; as alſo what was found upon the body. If the circumſtances be not ſuſpicious, the body ſhall be interred privately in the cemetery.

3.) When a woman with child happens to die after the ſixth month of her pregnancy, ſhe cannot be interred till firſt the child of which ſhe is pregnant be taken from her.

4.) In general, no precipitation ſhould be uſed in interring the dead, as experience proves that perſons who have been thought dead, have recovered their ſpirits after ſome days.

§ 15.

According to the Roman laws, every private perſon might inter the dead in his own ground, and the place wherein they were depoſited became thereby religious; that is, it could no longer be deſtined to civil uſes; wherefore alſo the Roman laws reckoned things

things religious among thoſe which had no maſter, and which conſequently were not the inheritance of particular perſons.

The reaſon of this was, that the Romans thought that the ſouls of the dead, which they called their manes, remained near their ſepulchres, and that they could not be violated without diſturbing the manes.

But ſince Chriſtians have deſtined certain places for the burying of the dead, namely, temples and cemeteries, theſe places are indeed religious; nevertheleſs they are not ſo by the preſence of the manes, but by the public authority, which hath conſecrated them for that uſe, and abſtracted them from any civil uſe.

§ 16.

Thence it follows, that if any one bury his dead in a private place, belonging to himſelf or to another, that place remains in the inheritance of the perſon who was proprietor of it, becauſe it was not conſecrated to that purpoſe by public authority. Our will is, nevertheleſs, that when ſuch an attempt ſhall be known, the body be carried into the ordinary cemetery, by order of the judge, and at the charge of the perſon who cauſed it to be interred, on whom an arbitrary puniſhment ſhall be inflicted.

§ 17.

Places deſtined for the burial of the dead belong to the public; ſuch are common or particular cemeteries, ſuch likewiſe are family or hereditary tombs.

§ 18.

Public places deſtined for the burial of the dead, are appointed and aſſigned to every pariſh by the ſovereign, and the conſiſtories, without the neceſſity of a particular conſecration.

If then any one inter his dead in the cemetery of another pariſh, ſuch pariſh could not be obliged to ſuffer it;

it; and if he do not find means to make up matters with thoſe concerned on this head, the dead body ſhall be dug up, with the knowledge and by ſentence of the judge, and carried, at the charge of the delinquent, into the cemetery of his own pariſh; he ſhall beſides be puniſhed for this irregularity.

One may, nevertheleſs, bury his dead in the cemetery of a ſtranger pariſh by conſent: provided always that he pay to the paſtor of his own pariſh his dues, which are called *jura ſtolæ*.

§ 19.

Family tombs, or hereditary tombs, are raiſed either in temples and cemeteries, or in places which are not reckoned religious. As to raiſing tombs in cemeteries, or in temples, there is no need of a grant from the ſovereign, becauſe the places themſelves where they are raiſed, have already been deſtined by public authority to the burial of the dead.

But when a tomb is to be raiſed in a place which is not reckoned religious, the ſovereign's conſent muſt be obtained, becauſe it is not allowable for private perſons to take away from the commerce of mankind any place whatever. It is even requiſite in this caſe, that all ſuch as have any right or intereſt in the place deſtined for that purpoſe, as joint lords, agnats, life-renters, creditors on mortgage, *&c.* give their conſent to it: it is ſufficient, nevertheleſs, that they approve afterward of the ſteps taken on that head.

A perſon who has once given his conſent cannot afterwards retract, even though things were ſtill entire.

Not only all ſuch as belong to the family, and conſequently diſinherited children, have a right to thoſe hereditary tombs, but alſo all ſtrangers, who are become heirs by virtue of a will; among whom, nevertheleſs,

heleſs, are comprehended only the heirs called *fiduci-*, and not heirs to feoffments in truſt.

A perſon who by will has ſimply the enjoyment of all the effects, has no right to theſe tombs.

When ſeveral perſons have a right in them, they may cauſe their dead to be laid there, even againſt the inclination of the others concerned.

§ 20.

Public or hereditary tombs are no longer ſubjects of commerce, and cannot be employed to civil uſes: no private perſon then can aſſume to himſelf ſuch a right of property in the places where they are ſituated, as by virtue thereof he ſhould think himſelf entitled to put them to civil uſes.

But with reſpect to the religious uſe, they remain really ſubjects of commerce. Wherefore alſo they may be alienated or tranſmitted to others in their quality of tombs, either by deeds between perſons in their lifetime, or by teſtamentary ſettlements.

Moreover, our will is, not to permit, that, without very ſtrong reaſons, and the approbation of the regencies, a body can be taken out of a tomb to be tranſported elſewhere.

§ 21.

As interments and tombs are included in the number of *favourable things*, ſeveral privileges have been granted to them.

a) It is not allowable to cauſe a dead body to be raiſed for debts on pain of loſing the capital.

b) An action cannot be intented againſt heirs for debts contracted by the defunct till after his interment, and the expiration of four weeks, to be reckoned from the day of his deceaſe.

c) When the cemetery becomes too ſmall, private perſons who have lands adjacent may be obliged to ſell them in order to enlarge it.

d) It

d) It ſometimes happens, in times of peſtilence, of war, of inundation, and other like caſes, that the ordinary road to a tomb is ſtopped; in ſuch caſes it ſhall be allowable to carry the bodies thither through the neighbouring lands or meadows, provided always that the proprietor of theſe lands be required to ſuffer them to paſs.

e) When the road leading to a tomb is deſtroyed by the impetuoſity of the river running by it, or by any other accident, the neighbour ſhall be obliged to grant a paſſage, for a yearly toll, which, in caſe of diſpute, ſhall be ſettled by the judge according to equity.

f) Proceedings are ſummary in all affairs concerning tombs and interments, and an appeal takes place only with reſpect to the effect which is called devolved, *(quoad effectum devolutum.)*

§ 22.

As we have obſerved, that places deſtined for the burial of the dead acquire the appellation of things religious, which exempts them from civil uſes, only by the law and by their deſtination, it follows, that this quality ceaſes whenever it is allowable to employ either cemeteries or hereditary tombs to civil uſes, as happens,

1.) When by conſent of the ſovereign other places are deſtined for them, and, as a conſequence of the new ſettlement, the cemeteries and tombs are no longer deſtined for the burial of the dead; in which caſe, nevertheleſs, the bodies in them ought to be taken out, and tranſported to the new cemeteries.

2.) When an enemy has made himſelf maſter of the country; by reaſon that the ſovereign's right over things religious and their deſtination ceaſes, and conſequently cemeteries become private things; though it be uſual enough among Chriſtians to ſpare,

as

as much as poſſible, dead bodies, and their tombs.

§ 23.

Several actions reſult from the rights granted in favour of interments and tombs.

I.) A man who is hindered to inter his dead in the place where he has a right to do it, may raiſe the action called *de religioſis*.

But this action does not take place,

a) When the defunct has committed a crime which renders him unworthy of burial. See above, § 13.

b) When he has been condemned to exile, or to perpetual baniſhment.

c) When by emancipation one has loſt the family-rights, and conſequently the right of being interred in the family-tomb. But this right is not loſt by the preſcription of thirty years, when one has not buried his dead during all that time. The caſe would be otherwiſe, if a perſon, having this right, and wanting to bury one of his dead there, had been hindered by the poſſeſſor of the tomb; and that he who had this right, and his deſcendants, had been ſilent on the head for thirty years.

A perſon who is hindered to carry his dead by the highway, or even by a road which he has a right to paſs, may alſo intent an action *de religioſis*, for the preſervation of his right.

The ſame action takes place, when, againſt the inclination of the poſſeſſor of a tomb belonging to a ſtranger, any one has cauſed inter a dead perſon there; for he and his deſcendants may be obliged to cauſe carry away the dead perſon, and to reimburſe the charge and damages occaſioned thereby.

II. When a cemetery or family-tomb is violated, the dead raiſed or ſpoiled, the mauſoleum deſtroyed, the tombs broken open, any thing carried away, ſuch as croſſes, ſtandards, *&c.* a habitation built on the

place deſtined for the burial of the dead, or nuiſances thrown out there, &c. a proſecution may be raiſed on an action called *of the violation of ſepulchres*, (*actio de ſepulchro violato*), by the poſſeſſors of the religious places, who may oblige the author of any of theſe diſorders, to put, at his own charge, the things in their former ſtate, and to be accountable to them for all damages and intereſt. We reſerve to the exchequer the right of proſecuting the violator; and if the proprietor of the tomb do not think it proper for himſelf to proſecute the violation, he may inform the fiſcal of the fact, who ſhall intent this action in his own name. The intereſt of ſuch as have ſuffered by the violation of religious places, ſhall be eſtimated according to the quality of the dead, and in proportion to the malice of the violator; that is to ſay, an eſtimate ſhall be made of the greatneſs of the injury, and the damages ſuffered. One who ſhall commit an outrage, and deliberately abuſe a dead body, may even be puniſhed corporally.

III. When a man violates a tomb with an armed force, or by any other ſort of violence, an action *de vi et vi armata*, may be intented againſt him, of which mention ſhall be made in the third part of this work.

The laws have alſo granted ſeveral actions or prohibitions to maintain poſſeſſors of tombs in their poſſeſſions.

I. The action or interdict *de mortuo inferendo*. One who is in poſſeſſion of interring his dead in a certain place, and who is hindered from doing ſo, may intent this action againſt ſuch as diſturb him in his poſſeſſion, and demand that they be prohibited to do ſo for the future. He has alſo an action *de vi et vi armata*, if theſe hinderances be accompanied with violence, or be done with an armed force.

And as it is the public intereſt that interments be not retarded, the dead body, in caſe of diſpute, ſhall, nevertheleſs,

nevertheleſs be interred in the mean time in the diſputed ground, if he who wants to depoſit it there do in any wiſe prove his poſſeſſion; but it is allowable for him who thinks himſelf wronged thereby to apply to the judge, who ſhall give ſentence on the difference after having cited the parties to a ſhort day, and peremptorily. Moreover, one cannot appeal againſt ſuch a judgment given upon poſſeſſion.

If a perſon cannot immediately prove his poſſeſſion, he who is hindered from interring his dead in a certain place, ſhall depoſit it in another, and ſhall proſecute his right, by way of petition, by the action called *in factum*.

The action or interdict *de mortuo inferendo*, takes place alſo when one is hindered from carrying his dead by the high-road, or by ſuch other as he has a right to paſs by; and one may demand, by virtue of this interdict, to be maintained in his poſſeſſion of conducting and carrying his dead that road, and that the perſon who oppoſes it be prohibited to do ſo for the future.

As foreign powers and their ſubjects cannot procure a paſſage through our dominions without our conſent, he who ſhall oppoſe their paſſage cannot be proſecuted by virtue of this interdict; but if it be only to get a paſſage for a dead body from one juriſdiction to another, there needs neither requiſition nor grant for that purpoſe; and the interdict ſhall conſequently take place againſt the oppoſers; neither ſhall a perſon be obliged to pay any dues to the churches of the places through which he ſhall carry his dead.

II. The action or interdict, called *de ſepulchro ædificando*. A man who intending to make any reparations on his tomb, or raiſe any building there, or cauſe any monument to be erected, or any epitaph in memory of his relations and benefactors, *&c.* ſhall be hindered from ſo doing, may, by virtue of this inter-

dict profecute the perſon who gives him diſturbance in this deſign, and demand that he be prohibited to throw any impediment in his way.

§ 24.

A man who has been at any charge for the burial of a dead perſon, whom he was not obliged to get interred, may demand it, by virtue of an action called *funeraria*. This action flows from a ſuppoſed contract; for he who has laid out theſe charges, has profitably managed the affairs of the perſon who was obliged to get the dead interred; and conſequently this laſt would be enriched at another's expenſe, if he were not obliged to reimburſe the charges. And this is the reaſon why this action, which is competent to the heirs of the perſon who paid the charges, takes place alſo againſt the heirs of him on whoſe account they were paid.

§ 25.

The action called *funeraria* is either direct or contrary.

1.) In general, the direct action is allowed to all ſuch as have expended any thing for the interment of thoſe whom they were not obliged to get interred.

2.) It is granted, in particular, to a huſband who has cauſed his wife to be interred at his expenſe.

3. It is granted alſo to the heir called in law *fiduciarius*, when he has cauſed the teſtator to be interred at his charges.

N. B. The heir called *fiduciarius* is he who is indeed appointed heir, but who is at the ſame time charged to return all the ſucceſſion to another, who is called the heir *feoffee in truſt*.

4.) A widow may, in the ſame manner, by virtue of this action, claim reimburſement of the charges expended by her for the interment of her huſband.

5.) Still more, a legatary and uſufructuary, or life-renter, of all the effects have a right to redemand the funeral

funeral charges, even though the legacy were given in conſideration of the care which the legatary ſhall take of the interment.

6.) If one ſhould cauſe to be interred, at his own charges, a perſon to whom he thought himſelf heir, and were afterward caſt in his claim to that perſon's ſucceſſion, he would likewiſe have a direct action to recover the charges which he had expended.

7.) With reſpect to ſuch as ſucceed to fiefs, the caſes muſt be diſtinguiſhed. For if it be a ſon who ſucceeds equally to the fiefs and allodial effects, he is bound to pay the funeral charges; but if thoſe who ſucceed to the fiefs are more remote agnats, who do not inherit the allodial effects, it belongs to the heirs of theſe laſt effects to bear thoſe charges. Nevertheleſs,

a) If the allodial effects be not ſufficient to pay them, the agnat ſhall be bound to furniſh what is wanting in the ſum neceſſary for diſcharging them; but he cannot be obliged to do any thing more.

b) If the agnat by the defunct's benefaction (*ex beneficio defuncti*) have been admitted to a new fief, his charges ſhall alſo be taken out of the fief, in ſo far as it can afford them, and that they could not be afforded out of the allodial effects.

8.) When a man dies ſo poor that he has not left any thing to afford the charges of his coffin, it ſhall be made at the expenſe of the church; if the church cannot afford it, a collection ſhall be made in the pariſh; and if that fund be inſufficient, the patron of the church ſhall be bound to ſupply it: in ſuch a caſe the grave-digger ſhall make the grave without exacting any thing for his dues, and the body ſhall be carried to the grave by the poor who aſſiſt about the church; or if there be none, by the day-labourers or journeymen of the place, whom the judge ſhall name; if theſe laſt refuſe to do it, others ſhall be hired, and what

what they ſhall coſt, ſhall be exacted by way of execution from thoſe who would not ſubmit to the judge's order.

§ 26.

It follows from what has been ſaid, that the action called *funeraria directa*, takes place againſt all thoſe who are obliged to inter the dead. Conſequently,

I. This action may be intented againſt the defunct's heirs; for as the funeral charges of a perſon are to be taken out of the effects which he has left, it is juſt that thoſe who profit of them bear thoſe charges.

It muſt be obſerved, moreover, that thoſe charges which have a right of preference before all the debts of the ſucceſſion, are to be taken out of the whole maſs of the effects left by the defunct, and before the debts and legacies are deducted from it.

II. This action takes place againſt the heir feoffee in truſt, and not againſt the heir charged to reſtore the ſucceſſion to another; the reaſon of which is, that the firſt poſſeſſes the fortune out of which the funeral charges are to be taken. Thence it reſults, that if the heir charged to reſtore the ſucceſſion were obliged only to reſtore it in part, he would be bound to pay thoſe charges proportionally to what he ſhould keep of the effects of the ſucceſſion.

III. This action takes place likewiſe againſt a huſband who has got the portion, and who, for that reaſon, is obliged to bury his wife at his own charges.

But if he get only a part of the portion, neither ſhould he be bound to pay the funeral charges, but proportionally to what he has received; the reſt being to be paid by the wife's heirs. If then he have got only 100 rix-dollars of the portion, and the ſucceſſion amount to 300 rix-dollars, the heirs ſhould bear two thirds of the funeral charges, and the huſband the other third.

This

This rule admits an exception, when a husband gets the portion on account of his wife's adultery: because, at bottom, the husband gains nothing thereby, the portion being left with him only as a compensation of the wrong done him.

When the husband has received nothing from his wife, a distinction must be made, whether she left any fortune, or whether she were in indigence.

In the first case, her parents or other heirs are to pay the funeral charges; and, in the last case, it belongs to the husband to pay them out of his own money.

IV. This action, in like manner, takes place against the defunct's widow, whether she have gained any thing by her husband's will, or by the donation on account of the nuptials; or if she have got the portion due by the statutes called *statutaria*. In all these cases a wife shall be subject to the same obligations as a husband.

V. When a son appoints his father heir only for the legitim, the father is bound to pay his son's funeral charges only proportionally to the legitim.

§ 27.

To avoid as much as possible the differences which may arise with regard to funeral charges, when the question is to know who ought to be liable for them, and to how much they may amount, we have enacted and ordained, by a particular edict dated the 27th of February 1747,

1.) That for the funerals of a gentleman who was in a high station, or was vested with a great employment or character, the heirs cannot be obliged to pay above 300 rix-dollars.

2.) That, for the funerals of a simple gentleman, they cannot expend more than 200 rix-dollars.

3.) That the funeral charges of a person who was not

not noble, but who nevertheleſs poſſeſſed a conſiderable employment, and, at leaſt, equivalent to the character of a counſellor at law, cannot exceed, at moſt, the ſum of 150 rix-dollars; which ſhall, in like manner, be obſerved in regard to perſons who are eſteemed above the ſtation of a burgeſs or citizen.

4.) That the funeral charges of every other perſon ſhall be proportioned to their profeſſion and birth, and can never exceed the ſum of 100 rix-dollars.

5.) When a perſon's effects are not ſufficient to pay his debts at his death, and a competition ariſes between the creditors, they ſhall obſerve what we have already ordained in our Frederician Code, namely, that, for the funeral charges of a gentleman, or of a commoner, poſſeſſed of a conſiderable employment, they ſhall be allowed only the ſum of 50 rix-dollars; for thoſe of a commoner of ſmall employment, or thoſe of a merchant or tradeſman, only the ſum of 30 rix-dollars; and of thoſe of a common burgeſs only the ſum of 10 rix-dollars.

Theſe ſums ſhall be paid to thoſe who have advanced the funeral charges, proportionally to what they have advanced.

§ 28.

Thoſe who ſhall contravene what has been preſcribed with regard to funeral charges, ſhall be arbitrarily puniſhed, and, for that purpoſe, fiſcals are charged to give their aſſiſtance. Our will is, that the puniſhment take place, even when the defunct's will has only been followed. And we ordain, that any one who expends for funeral charges above what has been regulated, be caſt in his demand to the extent of the ſurplus.

§ 29.

As we have already regulated, by edict of the 3d of January 1748, the rate of funeral charges in the cities

cities of our reſidence, it is ſufficient to refer thither.

§ 30.

When any one has taken the care of a perſon's funerals, who was a ſtranger to him, and has paid himſelf of his diſburſements out of that perſon's ſucceſſion, he who was bound to provide for his interment has the action called *funeraria contraria*.

By virtue of this action, he may oblige the perſon who took the charge of the funerals to give an account of the expenſe, to prove it, and to reſtore what he has in hand more than he expended.

§ 31.

The action called *funeraria* ceaſes,

1.) When one has cauſed a dead perſon to be interred out of generoſity, or from a motive of compaſſion, and by no means with an intention of redemanding the funeral charges.

Nevertheleſs, as, in a doubtful caſe, it is not preſumeable that a man who advances funeral charges, deſigns an act of liberality; and as judges cannot know whether he has laid out the expenſe from generoſity, or in hopes of being reimburſed; it muſt be referred to his own oath, ſuppoſing there be no other way of clearing up the matter.

When fathers, or mothers, or children, are at the expenſe of funerals, it is preſumed to be done with an intention of not redemanding them, (*animo donandi*), unleſs they have taken a formal proteſt to the contrary.

If they have made theſe advances within the ſpace which the laws allow them to deliberate whether it be proper for them to accept the ſucceſſion or to renounce it, and if afterward they renounce it, they have, in that caſe, a right to redemand the funeral charges.

§ 32.

2.) This action ceaſes, when he who laid out the funeral charges may intent another action; as,

a) When the defunct, or the perſon who is obliged to take care of his interment, intruſted his funerals to a third perſon; in which caſe, againſt that third perſon, can be raiſed the action called *actio mandati.*

b) When the heir called *fiduciarius* has cauſed the teſtator to be interred at his charges, without redemanding them from the heir feoffee in truſt, on delivering to him the ſucceſſion; in which caſe he cannot intent againſt him the action called *funeraria*, but he may ſue him in an action called *condictio indebiti.*

c) When one of the heirs alone advances the funeral charges, he may demand from his co-heirs proportionally reimburſement of what is due to him by means of the action called *actio familiæ erciſcundæ.*

ART. III.

Of things conſtantly deſtined to the public uſe, and the abuſe and violation of which are prohibited under ſevere penalties, by the laws called pœnales.

(De rebus ſanctis.)

§ 33.

THE Roman laws reckoned, in the third place, among the things which are not the inheritance of private perſons, *(extra patrimonium privatorum)*, things holy, *(res ſanctas)*; that is to ſay, things which are conſtantly deſtined to public uſe *, and the abuſe and violation of which are prohibited under ſevere

* Leg. 88. § 5. verb. obl. ibi ſacram, vel religioſam rem, vel uſibus publicis in perpetuum relictam, ut forum, baſilicum, &c.

penalties

penalties by the particular laws, which are called *pœnales*, (*per ſanctiones, unde res ſanctæ dicuntur.*)

§ 34.

In the number of inviolable things are the gates of a city, the walls, the ramparts, the King's palaces, ſtatues of princes, high roads, public market-places, markets, courts and tribunals of juſtice, temples, *&c.*

§ 35.

All theſe things are not the inheritance of any private perſon, but the property of them belongs, in ſome ſort, to the public, to whoſe uſe they are deſtined. Thence it follows that nobody can, for example, build in public places, nor make any alterations in them, nor lay down, or throw out in them, things which render them diſagreeable or inconvenient. If any one then attempt to do any ſuch thing about the gates of a city, or about the ramparts, all our ſubjects ſhall be at liberty to proſecute him by the action or interdict called *ne quid in loco ſancto fiat*, and to demand a prohibition againſt him to do the like; and, in caſe the thing be already done, that he be ordained to cauſe it to be carried off, and to reſtore the whole to its former condition.

But this interdict does not take place, when the alterations which a private perſon makes in public places are meliorations or ornaments, in which caſe he may be obliged, at moſt, to cauſe what he has done to be carried off, and to reſtore things to their former condition.

§ 36.

The laws have alſo provided for the ſecurity of public things, by attaching to their violation very ſevere penalties; they have, for example, decreed that a man who deliberately cauſes any damage to the

gates of a city, to a royal palace, or to a prince's ſtatue, &c. commits a public crime, of which any one may proſecute the revenge by means of an action called *de vi publica*; that an action of robbery *(actio furti)* may be intented, not only againſt him who has carried off any thing from a public place, but that he may alſo be proſecuted criminally: that the injuries or offences done in a pubic place are put in the rank of the injuries called atrocious, and which may be proſecuted criminally.

§ 37.

Certain perſons are alſo called inviolable, *(ſanctæ)*, becauſe more rigorous penalties are enacted by the laws againſt ſuch as ſhall dare to offend them.

We include, in the number of theſe inviolable perſons, our own proper perſon, and all our royal family, willing that all ſuch as ſhall forget the reſpect due to us, be treated as guilty of high treaſon.

In the ſame ſenſe, to the number of inviolable perſons are referred the officers of the King's houſehold, magiſtrates, ambaſſadors, fathers, and mothers, &c.

ART. IV.

Of things, the property of which cannot be purchaſed, but whoſe uſe is common.

(De rebus communibus.)

§ 38.

AMong the number of things which are not the inheritance of private perſons, are comprehended, in the fourth place, ſuch as are of a nature not to be liable to the acquiſition or occupation of particular

lar perſons, to poſſeſs them in property, but whoſe uſe is common to every one. Wherefore they are called things common, *(res communes)*, or things public by the law of nations; or elſe *res publicæ jure gentium*; even things which belong to nobody, *(res nullius)*, becauſe no man can obtain the property of them.

§ 39.

Among things common are, 1.) The air, 2.) Running water, *(aqua profluens)*, 3.) The ſea, with its channel and ſhores, *(mare, ejuſque littora et alveus)*, 4.) Greater and ſmaller public rivers, with their channels and banks, *(flumina publica eorumque ripæ et alvei.)*

§ 40.

In the number of things common muſt firſt and principally be placed the air, *(aer)*, which, of its own nature, cannot be poſſeſſed by any man in excluſion of the reſt, and for that reaſon is not the inheritance of particular perſons. The air having no maſter who can prohibit the uſe of it to others, it thence reſults, that, by the law of nature, the uſe of the air is common to all men, and conſequently all men may breathe it, *&c.* raiſe a building to what height they pleaſe, even though they ſhould thereby take away the light from their neighbour, and take the birds which fly in the air, *&c.*

Nevertheleſs, as it is allowable for a ſovereign to limit this natural liberty of mankind for the public good, we alſo have done ſo in the two following caſes.

I. When a man, without neceſſity, and only out of malice, raiſes on his ground a building, or heightens it to take away his neighbour's light, it appears to us unjuſt to allow him to act ſo out of caprice and ill nature. Wherefore our will is, that, in ſuch caſes, the commiſſioners of buildings, and, in places where there

there are none, the ordinary judge take cogniſance of this, and decide according to equity.

II. It is already known by the conſtitution of the Emperor Frederic, that all the things which have no maſter, ſuch as the birds of the air, belong to the royalties, (*regalia*). Wherefore no one can, without our conſent, and a grant from us, take birds in the air, as is particularly regulated in our ordinance concerning fowling and hunting.

§ 41.

In the ſecond place, among common things is comprehended running water, (*aqua profluens.*) It is not the inheritance of particular perſons, becauſe, being in a perpetual flux, it is of a nature neither to be acquired nor poſſeſſed by men. As then running water has no maſter, it follows, that, by the law of nature, every one may uſe it, draw it, or water his cattle in it. Nevertheleſs it is evident, that when, by our conſent, a perſon has obtained the uſe of it in particular, and has, ſo to ſpeak, occupied a part of it within the limits of his own eſtate, he is not obliged to ſuffer every one to come and draw, or water his cattle. We ſhall treat, in the third part, of the actions which take place on account of running waters.

§ 42.

In the third place, among things common, and which conſequently are not the inheritance of particular perſons, are put the ſea, with its channel and ſhore, in ſo far as either is neceſſary to get the ordinary uſe of the ſea, (*mare, et per hoc littora et alveus maris.*)

The ſea comprehends three things, to wit, a) The water in its channel, b) The ſhore, or beach, with which it is ſurrounded, and c) The channel or bottom which ſupports it. As to the water of the ſea, it ought ſtill leſs than running water to be poſſeſſed by men, and put in their power; and, for that reaſon,

ſon, every one may, along our coaſt, take the ordinary uſe of it, which conſiſts in a free navigation, and every thing relative to that uſe.

Whence it follows, that every one may land on our coaſt, refit veſſels, build huts, and unload merchandiſe, *&c.*; every one may alſo caſt anchor along our coaſt.

But as to the other uſes of the ſea, which are not relative to navigation, we have reſerved them for ourſelves, over all our coaſts, and have included them among our royalties. No one then ought to appropriate them to himſelf, till we have granted him permiſſion ſo to do.

It follows, 1.) That nobody can aſſume the fiſhing along our coaſts; for, as we cauſe the fiſhing to be done by our bailies, our vaſſals, *&c.* the right of fiſhing there is already occupied by us.

2.) That no one can build houſes along our coaſts, raiſe towns, gather amber, or limeſtone, (which the Baltic ſea throws out in great quantity on the beach), nor take other things which are found on the ſea-coaſts. For all that is no appendage of navigation.

3.) That no one can throw into the bottom of the ſea ſtones, and other ſuch ſuch things, to build upon, *&c.* Neither can they,

4.) Appropriate to themſelves an iſland which might happen to be formed on our coaſts, nor do any thing, in fine, which may obſtruct navigation, or endamage the ſhore.

We ſhall treat, in the third part, of the actions of interdicts which take place with regard to the ſea.

§ 43.

In the fourth place, among things common are numbered public rivers, (*flumina publica*), as well as their channels and banks, (*ripæ et alvei*), in ſo far as theſe

these things are useful for navigation and its dependencies.

Rivers are called public which run the whole year, without ever being dry, whether they carry boats or not.

Public rivers differ then in this from brooks or rivulets, that brooks or rivulets are sometimes dry in the heat of summer.

A public river, as well as the sea, comprehends, a) The water which runs in it, (*aquam profluentem*), b) The banks, (*ripam*), and c) The channel, (*alveum*). It has already been observed, with respect to the running water of a river, that as no one can acquire the property of it, nor have it in his power or keeping, the use of it was common to all.

We have also said, that every one is allowed to use the banks and channel of a river, as far as that is necessary for using the river itself, of which it would not be possible to make any profit, if it were prohibited to touch its bottom, or to approach its bank. We have also already explained, in what the common use of rivers consists, as well as that of their channels and banks. As to navigable rivers, their principal use consists in the liberty of navigating upon them, which is founded on the right of passage (*jure transeundi*), of which we shall speak in the following section.

We have, in like manner, remarked, that, excepting navigation and the rights depending on it, every other use of public rivers belongs to our royalties, and ought no longer, by our subjects, to be numbered among things common.

§ 44.

Private rivers, rivulets, and brooks, do not differ from other subjects belonging to particular persons; consequently their use is not common to all men, but belongs to such through whose grounds these

rivers

rivers and brooks run. If then the grounds of two particular perſons be ſeparated by ſuch a brook, and if, by the violence of the current, the one happen to loſe a part of his ground, and it accrue to the other by means of alluvion, (*per alluvionem*), the firſt may obtain, by an action *finium regundorum*, reſtitution of the old boundaries.

We ſhall treat, in the third part, of the actions or interdicts which take place with reſpect to public rivers, their channels and banks.

§ 45.

In the fifth place, among common things are reckoned high-roads, (*viæ publicæ.*)

For the right of paſſage (*jus tranſeundi*) being common to all men, our will is alſo, that it be allowable for every one to paſs through the countries under our government, and that none can be hindered from ſo doing, unleſs there be very ſtrong reaſons to oppoſe it, ſuch as the loſs which might thence reſult to our prejudice.

To facilitate the paſſage through the countries and territories under our government, we have cauſed to be marked out, after the example of other nations, highways and public roads, by which every one may go and come freely, and without fear of interruption.

Highways are not the inheritance of private perſons, and the uſe of them is conſequently common to all men. No body then has a right to interrupt the paſſage of the highways, nor to render it more difficult *.

Moreover, no other right can be aſſumed to the highways but that of paſſage, for they belong to our royalties.

No walks or avenues, for example, can be formed upon them without our conſent.

* L. 2. § 21. ne quid in loco publico.

When the highway becomes ſo bad that it is impaſſable, as happens, for example, when the waters of a neighbouring river happen to overflow it, and the river makes a new channel of the high-road, ſuch as have lands adjacent, cannot be excuſed from yielding ſuch part of them as is neceſſary for making another road. If the river, leaving its new channel, return to its old current, and thereby the lands which before the inundation ſerved for a highway ſhould become free, a new change ſhall not, for that reaſon, be made on the highway; and conſequently ſuch as have yielded any of their lands for the new highway, cannot afterward reſume them. It muſt alſo be obſerved, that when an eſtate is ſold by the number of houſſes, arpens, or acres, the high-road ought not to be included, becauſe it is a common thing, which conſtitutes no part of the eſtate.

In the third part we ſhall treat of the difference of roads, and of the actions or interdicts which have been granted in relation to highways.

ART. V.

Of things whoſe uſe is conſtantly deſtined to a community.

(*De rebus univerſitatis.*)

§ 46.

IN the fifth place, among things which are not the inheritance of particular perſons, are reckoned ſuch as belong to a whole community; by which is underſtood that no one in particular has the property of them, but that the uſe of them is allowed to all who are members of the community.

§ 47.

The Romans reckoned among the things belonging

ing to a community public amphitheatres, circuſes, public baths, *&c.* According to the conſtitutions of our dominions, among things which belong to communities are reckoned ſhooting-places, where the burghers exerciſe themſelves in ſhooting with carabines, common paſturages, *&c.*

§ 48.

The laws grant to ſuch as are hindered from uſing thoſe things, interdicts or actions, of which we ſhall treat in the third part.

ART. VI.

Of things which have no maſter.

(*De rebus nullius.*)

§ 49.

THings which belong to no body, or which have no maſter, (*res nullius*), are alſo reckoned among thoſe which are not the inheritance of particular perſons.

§ 50.

By things which belong to no body are underſtood thoſe which never had any maſter, and thoſe which having had one have afterward loſt him; provided always that both be of a nature capable of being occupied; that is to ſay, of making a part of the effects of private perſons.

§ 51.

Among things which belong to no body are,

I. All wild or ſavage beaſts where-ever they are, in the air, in the water, or on the ground.

II. All things which never had a maſter, and which were never acquired or poſſeſſed by any body, ſuch as

amber and precious ſtones thrown out by the ſea on its coaſts.

III. Things which, after having been in the power of a maſter, are no longer ſo, becauſe his right of property comes to ceaſe, as happens when a man dies without an heir, and the ſucceſſion is thereby vacant, (*hereditas vacans.*) Such are alſo,

IV. Things abandoned, (*res pro derelicto habitæ*), that is to ſay, thoſe which the proprietor throws away and abandons, with an intention of having them no longer among his effects, or which he loſes without hopes of recovery.

What is loſt by a ſhipwreck is not then to be reckoned as a thing abandoned, when the ſea afterward throws it upon the coaſt, no more than what remains in the bottom of the ſea, when there is an intention to take it thence by divers, (*urinatores.*)

Far leſs can we regard as a thing abandoned what was thrown into the ſea near the ſhore, with a view to ſave the veſſel from ſhipwreck. It is the ſame as to things which are loſt by falling out of a carriage; he who finds them has not a right to them till the ordinary preſcription. It reſults from what has been ſaid, that the proprietor of thoſe things loſt in a ſhipwreck, or otherwiſe, may redemand them from the perſon who has taken poſſeſſion of them; and if he refuſe to reſtore them, an action of theft may be intented againſt him.

V. In general, all ſubjects vacant and without a maſter, called *adeſpota.*

§ 52.

We ſhall examine afterward, book II. tit. V. art. I. whether the things which belong to no body, may, according to the conſtitution of our ſtates, be poſſeſſed and purchaſed by particular perſons, and in what manner that can be done.

§ 53.

§ 53.

After having determined what are the things which are not the inheritance of particular perſons, and in which conſequently no private perſon has a real right, all other things not included in the preceding articles ought to be reckoned to belong to particular perſons.

§ 54.

We ſhall treat, in the following books, how things come to make a part of the effects of particular perſons, and how property in them is acquired.

TITLE III.

Of the difference of things corporeal and incorporeal, alſo of things moveable and immoveable.

(*De rebus corporalibus et incorporalibus, &c.*)

§ 1.

WE have hitherto treated of things as they are regarded either as being *not of the inheritance of particular perſons*, or as making a part of their effects, (*in patrimonio ſingulorum.*) We are now, in the ſecond place, to treat of things as diſtinguiſhed into corporeal and incorporeal, (*in res corporales et incorporales.*)

§ 2.

Corporeal things are ſuch as are of a nature to be ſeen, touched, and attached; ſuch are a houſe, an animal, gold, ſilver, *&c.*

§ 3.

Things incorporeal (*res incorporales*) are ſuch as cannot be ſeen, nor touched, nor attached with the hand; ſuch are rights, (*jura*); a juriſdiction, (*juriſdictio*);

dictio); obligations, (*obligationes*); ſervitudes, (*ſervitutes*); actions or demands in law, (*actiones*); ſucceſſions, or right of ſucceeding, (*jus hereditarium*); the right by which a man is bound to reſtore a certain quantity, &c. For though the objects of things incorporeal be themſelves ſenſible, and clothed with a body which may be touched and attached, nevertheleſs, as the right of poſſeſſing them, of redemanding them, &c. does not fall under the ſenſes, it cannot be touched nor attached.

§ 4.

Whence it follows, that as things incorporeal cannot be ſhown nor attached, they cannot be delivered by themſelves, and cannot be poſſeſſed but in thought and by an effect of the will. This has given occaſion to eſtabliſh a kind of tradition or delivery, which is called *quaſi traditio*.

§ 5.

A perſon to whom an incorporeal thing belongs is not reckoned to be its real poſſeſſor, becauſe for a real poſſeſſion the power of attaching the thing is required. They call him only a ſuppoſed poſſeſſor, (*quaſi poſſeſſor*), and his poſſeſſion a ſuppoſed poſſeſſion, (*quaſi poſſeſſio.*) This is the reaſon that as things incorporeal can neither be redemanded, nor acquired by uſucapion, the laws have granted, in ſuch caſes, the advantageous claim of right, (*rei vindicationem utilem*), and preſcription, (*præſcriptionem.*)

§ 6.

In the third place, things are divided into moveable and immoveable.

Things moveable are ſuch whoſe nature and property is, that they may be moved and tranſported; ſuch are gold, ſilver, jewels, coined money, houſehold furniture, fruits gathered and put up, &c.

§ 7.

Things immoveable are ſuch as conſiſt in immoveable ſubjects, or land-eſtates, and every thing annexed to them, as a houſe, a court, grounds, meadows, lakes, *&c.* and even the fruits, both ſuch as are ſtill on the trees, or are ſtill growing on the ground.

§ 8.

Among immoveable things are reckoned ſuch as have been deſtined to the perpetual uſe of an immoveable ſubject by its proprietor; ſuch as a baſon walled about, pictures, and other family-pieces, which have been expreſsly deſtined and ſet apart for the family; incomes or annual cuſtoms, and ſervices not redeemable, (*jährliche Renthen, unablöſliche Zinſen und Pachte, &c.*)

§ 9.

Things incorporeal are by their own nature neither moveables nor immoveables, but they are reckoned the one or the other according to the nature and quality of the thing to which they are annexed, or which they have for their object. Thus an obligation which concerns moveable things is put, as well as the action reſulting from it, in the number of moveable things; but if the obligation and action reſulting from it had an immoveable ſubject for their object, both would be regarded as things immoveable. It thence follows, that rents or yearly cuſtoms, as well as ſervices and duties not redeemable, to be taken out of an immoveable ſubject, and the obligations relating to theſe cuſtoms and ſervices, are immoveable things.

BOOK II.

TITLE I.

Subject of the ſecond book.

§ 1.

AFTER having laid down in general, in the preceding book, the nature and qualities of things, and the different kinds into which they are divided, in title II. we ſhall treat in general of real rights, (*de juribus in re*), of which the laws have only appointed four ſorts, property, (*dominium*); heritage, (*hereditas*); ſervitude, (*ſervitus*); and pledge, (*pignus.*)

§ 2.

In title III. we ſhall treat of the firſt real right, namely, of property, of which ſhall be given the definition, the cauſe, the diviſions, the ſubject, the object, and the means of putting an end to it, (*cauſa, diviſiones, ſubjectum, objectum, et modus finiendi.*)

§ 3.

In title IV. ſhall be explained the effects of property, and eſpecially the actions reſulting from it, namely, 1.) Claim of right, (*rei vindicatio.*) 2.) An action of exhibition, (*ad exhibendum.*) And, 3.) An action of diviſion of commons, (*communi dividundo.*)

§ 4.

And in title V. we ſhall treat of the means of acquiring property eſtabliſhed by the law of nations, referring to the following book thoſe which the civil law has introduced.

TITLE

TITLE II.

Of real rights in general.

(De jure in re.)

§ 1.

A Real right is acquired,
1.) By property, (*ex dominio.*)
2.) By ſucceſſion or inheritance, (*ex hereditate.*)
3.) By ſervitude, (*ex ſervitute tum prædiali tum perſonali.*)
4.) By pledge or hypothec on a thing, (*ex pignore.*)

§ 2.

Theſe four are the only real rights which entitle to a real action, all other actions being perſonal, though they be granted on account of things.

§ 3.

Some lawyers have indeed put poſſeſſion among real rights; but that is an error: for in matter of poſſeſſion there is no queſtion about real rights, (*de jure in re*), but concerning the fact of poſſeſſion, (*de facto poſſeſſionis*); conſequently the right reſulting from it is derived from perſonal obligation, and from different cauſes, (*ex obligatione perſonæ et variis cauſarum figuris*), as ſhall be ſhown in the third part.

§ 4.

Neither can we number among real rights ſuch as flow from the perſonal ſtate, nor comprehend in real actions actions prejudicial or preparatory; becauſe in this firſt object of right there is no queſtion either of things, or conſequently of real right, but only of

the perſonal condition and quality, and the rights reſulting from them.

§ 5.

Actions of reſtitution (*actiones reſtitutoriæ*) do not belong to real rights, becauſe by theſe actions the thing is not ſought nor redemanded; but only a deed which was valid (*negotium validum*) is annulled.

§ 6.

Far leſs can the actions called *in rem ſcriptæ*, be numbered among real rights, becauſe they have none of the effects of a real right, if it be not that for particular reaſons they may be intented againſt a poſſeſſor.

§ 7.

We ſhall begin by treating of property, referring the ſubject of ſucceſſions to book III. and IV.; that of ſervitudes to book V.; and that of pledges and hypothecs or mortgages to book VI.

TITLE III.

Of the firſt real right which ariſes from property.

(*Ex dominio.*)

§ 1.

THE firſt real right is that ariſing from the property (*ex dominio*) which men acquire in things: it conſiſts in the power of diſpoſing of a thing at our pleaſure.

§ 2.

The cauſe of property is founded on natural reaſon. Indeed naturally things before they are poſſeſſed belong to nobody, and having no maſter, no man can ſay that

that he is the natural proprietor of them. It is then allowable for the firſt occupant to ſeize them, and to reduce them under his power, no one having a right to hinder him.

When therefore a man takes hold of a thing with an intention to have it and keep it, he acquires the property of it, and conſequently a right of doing with it what he pleaſes.

§ 3.

Property is firſt diſtinguiſhed into general and particular, (*dominium generale et particulare.*) By general property is underſtood the right which we have as ſovereign to all the things which, having no maſter, are numbered among thoſe belonging to our royalties. As theſe things are ours without being put in poſſeſſion of them by ſeizing them, the right which we have to theſe things is only improperly called a right of property.

Particular property is the right which every private perſon has to what belongs to him as his own.

Property is, in the ſecond place, direct or uſeful, (*dominium directum vel utile.*) A man has the direct property, when reſerving the ſimple property of an eſtate, he gives the enjoyment of it to another: and one has the uſeful property when he has obtained from the proprietor or direct lord the enjoyment of an eſtate for ſeveral years, which takes place in long leaſes, in fiefs, and in other tranſactions, to which the laws have granted the effect of property.

In the third place, property is divided into real or fictitious, (*dominium verum et fictum.*) Real property is that which the true proprietor has acquired by a juſt title. Fictitious property is that which the laws have contrived to take place in caſes when really there is no property: of this order is, for example, that which creditors have to things which their debtor alienates to their prejudice.

In fine, in the fourth place, property is diſtinguiſhed into natural and civil, (*dominium naturale et civile.*) The natural property belongs to a wife, who ſells an immoveable ſubject for her portion; and the civil property of ſuch a portion belongs to the huſband.

§ 4.

The property of a thing can naturally be acquired only by ſeizing and laying hold of it, becauſe the property including the power of diſpoſing of a thing at our pleaſure would be ineffectual, if the thing had never been either in our power, or under our keeping. Wherefore it is right to ſay, that property takes its origin from poſſeſſion, and that it can never be acquired by ſimple covenants.

§ 5.

Every one who has the uſe of reaſon may acquire a right of property; but madmen, fatuous perſons, pupils, and minors under age, *&c.* cannot acquire it by themſelves, and the concurrence of guardians and curators is neceſſary. See above, part I. book III. tit. VII. §. 4.

§ 6.

Property is acquired either by the law of nations, that is to ſay, by methods founded in reaſon, or by the civil law, that is to ſay, by methods which civil laws have introduced. Of the firſt we ſhall treat in title V. and of the others in books III. and IV.

§ 7.

It may be laid down as a general rule, That there is nothing of which the property may not be acquired. From this, however, muſt be excepted,

1.) Things incorporeal, which of their own nature can neither be ſeized nor poſſeſſed; ſee art. I. of the following title. From the rule muſt alſo be excepted,

2.) Certain corporeal things; for example,

a) Thoſe

a) Thoſe which we cannot poſſeſs nor hold in our keeping, ſuch as the air, running water, the ſea, and public rivers.

b) Such as by the laws are excluded from the commerce of mankind, as things ſacred and religious.

c) Such as cannot be occupied but with a reſervation of the public uſe eſtabliſhed by the law of nations, and which are called common and public; ſuch are the banks and ſhore of the ſea, and of rivers and their channels, (*littora, ripæ, alvei.*)

d) Thoſe of which particular perſons have only the ſimple uſe, as things belonging to a city, or to a community.

§ 8.

We ſhall ſpeak of the effects of property in the following title.

§ 9.

The right of property is extinguiſhed, 1.) When the proprietor dies without leaving children; for when he leaves children, they preſerve the right of property, and have no need to declare themſelves heirs of their father to obtain his ſucceſſion.

2.) When the proprietor alienates a thing, and when, by conſent, it is transferred to another.

3.) When he abandons it with an intention to have it no longer among his effects; for example, when one throws money among the people. But we muſt not reckon as abandoned,

a) Things which a man does not keep carefully, and which he expoſes imprudently to the avidity of ſtrangers; for example,

b) Such as fall from a public carriage;

c) Such as by ſhipwreck fall into a public river, or are thrown into it; as well as,

d) Such as are loſt in the ſame manner at ſea, near to the coaſt. It is otherwiſe of things which are loſt out at ſea.

A perſon then who retains any of thoſe things which are not reckoned to be abandoned, and who, knowing the proprietor, does not reſtore them, ſhall be regarded and puniſhed as a thief.

4.) When the thing itſelf happens to periſh, or be deſtroyed.

5.) When an enemy carries away a thing, and puts it in his own keeping, as happens, when he tranſports it into his own limits.

Nevertheleſs, the property of a thing carried off by an enemy is not entirely loſt, becauſe the proprietor has, by virtue of the right of recovery or repriſal, (*jure poſtliminii*), hopes of recovering it. And this is the reaſon that he may leave it in legacy by will, and that the heirs may include it in the diviſion of the ſucceſſion. See below, tit. V. art. VI. § 35.

6.) When a thing which our ſubjects had taken from the enemy, is retaken by the ſame enemy before it be put under our keeping. See below, tit. V. art. VI. § 34.

7) When a thing ſo changes its former ſpecies, that its firſt form, or ſpecies, cannot afterward be reſtored. For, by this change of form or ſpecies, the thing is, ſo to ſpeak, conſumed and loſt, and conſequently there is nothing in the new ſpecies which the proprietor of the former can claim as belonging to him: and the new ſpecies belonging to nobody, and owing its exiſtence only to the deed of him who hath made it what it is (*facto facientis*), it belongs to him who hath made it ſuch in his own name. See below, tit. V. art. II.

But as a man who makes a new ſpecies of materials belonging to another, would be enriched at the expenſe of the proprietor of the materials, if he were not obliged to indemnify him, the latter may demand their value; or, if the new ſpecies cannot be reſtored to its firſt form, he may, by an action of exhibition,

ad

ed exhibendum, demand that the materials belonging to him be ſeparated from it, which he has, at the ſame time, a right to redemand.

By the examination of theſe principles, is ſeen the reaſon on which the laws are founded in deciding,

a) That the proprietor of materials may loſe the property of them by *ſpecification* or manufacture of a new ſpecies, by *confuſion* or mingling of things liquid, by *commixtion* or mixture of ſolid bodies, and by *acceſſion*.

b) That the proprietor of a piece of earth, of a plant, of a tree, *&c.* loſes alſo the property of them, when, being detached from his ſubject or ground, they are joined to that of another, and take root there.

c) That the proprietor of a tree, or of a piece of land, may loſe the property of the fruits which another has gathered or reaped upon his land; and, in fine,

d) That the proprietor of a piece of ground, which, by an inundation, becomes the new bed of a river, is deprived of his right of property in that ground; and that he does not loſe it, even though it be conſtantly overflowed, as long as it does not ſerve as a bed to the river.

By the change of ſpecies, not only the property is loſt, but even the real rights annexed to it, and which ſhall be mentioned in the title which treats of uſufruct *(de uſufructu.)*

8.) Property is loſt alſo by ſentences which have acquired the ſtrength of a thing determined, even though the judges ſhould have determined contrary to law. The reaſon of which is, that both parties have conſented to the deciſion of the judges.

9.) A man loſes, in like manner, his right of property to wild beaſts which he had taken, as ſoon as, having recovered their natural liberty, they are out of ſight. See below, tit. V. art. I. Whence it follows,

follows, that they cannot be redemanded from one who takes them afterward.

10.) The ſame is the caſe with a wild beaſt, which, being tamed and accuſtomed to come back, is abſent ſo long as to make us loſe hope of its return; it belongs, in like manner, to the firſt who ſeizes it, (ſee below, *ibid.*) In fine,

11.) The right of property is loſt alſo by preſcription. See book III. tit. V.

TITLE IV.

Of the effects of property.

(De effectu dominii.)

Alſo of the actions which flow from the right of property, namely, a) Of claim of right, demand, or challenge; b) Of the action of exhibition, ad exhibendum; *and c) Of the action of diviſion of commons,* communi dividundo.

§ 1.

HAving declared in § 8. of the preceding title, that we ſhould in this title treat of the effects of property, we are now to give an explanation of them.

§ 2.

The principal effects of property conſiſt in theſe two things.

I. The proprietor of a thing acquires a real right in it, by which he can diſpoſe of it at his pleaſure; and conſequently alienate it, conſume it, or ſpend it, in ſo far as that liberty is not reſtrained by our laws.

II. Property ſerves for a foundation of ſeveral actions;

actions; ſuch are, 1.) Claim of right, demand, or challenge; 2.) An action of exhibition, *ad exhibendum*, which is an action preparatory to the preceding; and, 3.) An action of diviſion of commons, *communi dividundo*. We are now to treat of each of theſe actions in particular.

ART. I.

Of a claim of right (revendication.)

(*De rei vindicatione.*)

§ 3.

CLaim of right (*revendication*) is a real action which the laws allow to the proprietor of a corporeal thing, againſt any perſon in poſſeſſion of it, and in virtue of which the poſſeſſor is bound to reſtore it, with all its dependencies, (*cum omni cauſa.*)

§ 4.

This action is direct, or advantageous. Direct title, or claim of right, is founded on real property, (*in dominio directo*), and is only allowed to the true proprietor.

The proprietors then who, by our laws, have only an advantageous or ſuppoſed property, (*dominium utile vel fictum*), have no direct action; but our laws allow them the profitable claim of right, which ſhall be ſpoken of at the end of this article.

It muſt be obſerved here, that a man who buys a thing in his own name, becomes proprietor of it, even when he pays it with another's money; ſo that he who furniſhed the money has no right to claim it: becauſe the queſtion is not to whom the money belonged, but in whoſe name the thing was purchaſed. There are however caſes in which the laws allow the profitable

profitable claim. They ſhall be mentioned in the laſt ſection of this article.

§ 5.

When a thing has been ſold to ſeveral perſons, he to whom it was firſt delivered is reckoned proprietor, whether delivered in reality or in a ſuppoſed manner, *(vel verè vel fictè)*, he alone can claim it, even though a) He have as yet paid none of the price, and b) Though the ſeller ſhould afterward have delivered it to another, who had paid the whole price.

§ 6.

It is not preciſely requiſite that the claimer held the property of a thing which he wants to claim at the time of litiſconteſtation, litigation, or controverſy; and it is ſufficient that he have acquired it when the affair is determined *(tempore judicati)*: for then the poſſeſſor can no longer oppoſe to him the exception, that he is not the real proprietor, *(exceptionem non competentis dominii)*. But if the poſſeſſor of a thing ſhould deny, that the claimant is the proprietor, the latter would be obliged to prove his right of property, and the title by which he acquired it.

Obſerve moreover,

1.) That he who only has the poſſeſſion of a thing, without being able to allege the cauſe on which that poſſeſſion is founded, would have no title.

2.) That neither would it be a ſufficient title for him, to prove that the thing was delivered to him, if he do not prove, at the ſame time, that the delivery was made in virtue of a title, or of a cauſe ſufficient to transfer the property, *(ex cauſa dominii tranſlativa)*; and,

3.) That the title itſelf would avail him nothing, if delivery had not followed upon it.

§ 8.

§ 8.

A perſon who intends to claim a thing, is alſo obliged to prove, that the perſon from whom he holds it acquired it by a juſt title, *(ex juſto titulo.)* When then a teſtator has left in legacy a thing on which another forms a claim, the legatary cannot demand it, unleſs he prove that the teſtator had the property of it.

§ 9.

Nevertheleſs, it is not always neceſſary that one who intends to claim a thing, ſhould ſpecify and produce the titles by virtue of which he has the property of it: it is enough, that he prove by tokens, and ſufficient preſumptions, that he and his anceſtors have poſſeſſed, for ſeveral years, the thing which is in litigation, as belonging to them in property.

Obſerve, that it is proper, nevertheleſs, for the claimant to produce his particular title; becauſe it may happen, that after being caſt in his claim, which he had founded only on his right of property in general, he might afterward incline to prove his particular title, and that then he would no longer be allowed ſo to do, by reaſon that the exception of a thing determined, *(exceptio rei judicatæ)*, would be objected to him, all particular titles being included under the general denomination of property, in the proof of which he had been caſt.

Whereas, if he produce his particular title, and that it be not found ſufficient and valid, he may ſtill obtain a ſentence and concluſion, on producing other titles.

§ 10.

A claim cannot be intented but againſt the poſſeſſor; but it is ſufficient in order to raiſe it, that before publication the defender be in poſſeſſion of the thing claimed. It is alſo indifferent whether the defender poſſeſs it in his own name *(naturaliter)*, or in the

name of another *(civiliter)*; whence it follows, that a claim likewiſe takes place againſt a farmer, a depoſitary, a borrower, *&c.* and even againſt every defender who poſſeſſes a thing without title.

§ 11.

We reckon alſo as poſſeſſors,

I.) Such as have alienated a thing by fraud, or by a groſs fault, *(lata culpa)*, that is to ſay, a palpable ignorance, and who allege afterwards that alienation to be freed from any proſecution. It would be otherwiſe, if it were alienated on a ſuppoſed right.

§ 12.

II. Heirs are alſo bound for poſſeſſors, not only when they have alienated the thing fraudulently, but even when they have done ſo on a ſuppoſed right, when the cauſe has been already debated with the defunct.

§ 13.

In fine, ſuch as are regarded III.) as poſſeſſors, who voluntarily offer themſelves to anſwer the claim, and litigate the cauſe, though they do not poſſeſs the thing, or poſſeſs it only in name of another.

The defenders cannot object after debate, that they do not poſſeſs the thing, or poſſeſs it only in name of another; but they are obliged, according to circumſtances, to reſtore either the thing itſelf, or its value, with all damage and intereſt, *(cum omni cauſa.)*

If, in the ſecond caſe, the perſon in whoſe name the defender poſſeſſes the thing interpoſe himſelf, and defend his own rights, the poſſeſſor is not obliged to deliver it; and the claimant is bound, in the firſt place, to get his claims decided againſt him from whom the poſſeſſor derives his right; but this laſt ought to pay to the claimant all the charges which he has occaſioned to him.

When the poſſeſſor has already been ordained by ſentence

ſentence to deliver the thing, and when, conſequently, his author does not interpoſe till the moment of execution, it ſhall not be retarded by his oppoſition or objection, and the proceedings in this caſe ſhall be as is ordained in § 28. of this title.

§ 14.

If the defender deny that he poſſeſſes the thing, the claimant is bound to prove it; and, if he prove it, the defender is bound to deliver the thing immediately, without neceſſity of further procedure for that purpoſe; and if he intend to proſecute his right againſt the claimant, he muſt do it ſeparately, and muſt, beſides, take burden of the proof to be made.

§ 15.

When the proprietor raiſes this action againſt one who poſſeſſes the thing only in name of another, the poſſeſſor may be freed from the proſecution, on naming his author, againſt whom the claimant is to intent his action, even though the poſſeſſor ſhould have another real right in the thing, ſuch as, a right of ſervitude, or mortgage.

But 1.) If one who poſſeſſes in name of another, ſhould have the advantageous property of the thing, and be, for example, in poſſeſſion by a right of fief, of long leaſe, &c. he would not be freed on naming his author, and would be bound to debate the cauſe.

2.) If the queſtion were concerning a right of ſervitude, or even of mortgage, one who aſſumes theſe rights could not be freed from the action which another ſhould intent againſt him on that account, and would be obliged to litigate the cauſe for the defence of his own right.

Nevertheleſs, in both caſes, the poſſeſſor might cauſe his author or guaranty to be called.

§ 16.

§ 16.

When there are ſeveral proprietors of an eſtate, the poſſeſſor muſt deſign them all by their names and ſurnames, their qualities and reſidence.

§ 17.

But the poſſeſſor muſt ſummon and name the proprietor before litigation. If he do it only after, he ſhould be bound to reimburſe the claimant all the charges which he has occaſioned; and, if he wait to do it till the ſentence itſelf be paſſed, he ſhould be bound either to deliver the eſtate with its dependencies, or, if the proprietor preſent himſelf then, to pay to the claimant the value of the eſtate, on giving up his rights. For he ought to impute it to himſelf, that he was not liberated from the proſecution on naming his author, as well as that he had amuſed the claimant, and put him to charges.

§ 18.

A defender who names his author, is not obliged to prove that the author is proprietor of the thing, but only that he himſelf derives right from the author, or poſſeſſes it in his name.

§ 19.

The claimant ought to cauſe the author named to be ſummoned, and get the difference ſettled with him. In caſe he do not appear at the firſt citation, a ſecond day ſhall be appointed; and if he ſtill do not appear at this ſecond day appointed, the poſſeſſor ſhall be obliged to deliver the thing to the claimant. Moreover, the author named cannot come and object againſt the advantage taken of his neglect, but he ſhall be obliged to proſecute his right in a ſeparate action, (*in ſeparato.*)

§ 20.

In caſe the author named do not own himſelf proprietor of the thing, the poſſeſſor ſhall be obliged immediately

mediately to reſtore it to the claimant, with all the fruits received and receivable.

§ 21.

A perſon who wants to lay claim to a thing ought to deſcribe it in a circumſtantial manner. 1.) If it be a land-eſtate, for example, he ought to name the poſſeſſor, the number of acres, diſtinguiſhed in Germany by the words *huffen* or *morgen*, the ſituation, and ſuch other circumſtances. In caſe the lands be intermixed with others, and their limits cannot be ſhown, the defender's letters of purchaſe, the public regiſters, terriers or ſurvey-books, *&c.* ſhall be examined at the expenſe of the perſon who ſhall be caſt in the cauſe; and if, after meaſuring the lands, it be found that the defender poſſeſſes more than he ought to have, the judge ſhall allot to the claimant the lands which he wants, partly in good ſoil, and partly in worſe, as equity ſhall require.

2.) If a perſon want to claim a moveable thing, he muſt ſhow its quality and its quantity, with all the circumſtances; for example, if it be a beaſt, he muſt alſo tell its ſex, and its colour; if it be a veſſel, of what materials it is, of gold or of ſilver, *&c.*; if it be cloaths, their colour and kind; if they be things which are reckoned, their number; and if it be unwrought materials, their kind, their weight, *&c.*

3.) Finally, the claimant ought to declare whether he wants to claim the whole immoveable ſubject, or only a part.

§ 22.

Claim of right alſo takes place againſt the poſſeſſor's heirs, in ſo far as they poſſeſs the immoveable ſubject or land-eſtate. See below, § 28.

If then there be ſeveral heirs, and the immoveable ſubject be poſſeſſed only by one of them, the claim can be intented only againſt him.

§ 23.

§ 23.

By this action the individuals of corporeal things (*res ſingulares et corporales*) only are claimed, without diſtinguiſhing whether they be moveables or immoveables. Whence it follows that claim of right does not take place,

a) When a claim is formed upon a generality of effects, or of rights; for example, on a ſucceſſion, a flock, or other maſs of things.

b) When claims are formed to things incorporeal, for example, to a right; becauſe, properly ſpeaking, incorporeal things are not poſſeſſed. Nevertheleſs, when a corporeal thing is claimed, to which there are rights annexed, they follow the nature of the thing, becauſe it muſt be reſtored with all its dependencies.

c) When the queſtion is concerning things which are not ſubjects of commerce. Or,

d) Concerning ſuch as have received another form, and are become a new ſpecies, (*novam ſpeciem acceperunt.*)

§ 24.

The effect of this action conſiſts in the poſſeſſor's being bound to reſtore the thing to the claimant and proprietor, with all its dependencies, though a diſtinction muſt be made here between a *bona fide* poſſeſſor, or one poſſeſſing on a right which he preſumes good, and one poſſeſſing on a right which himſelf knows, or is preſumed to know to be bad, (*inter poſſeſſorem bonæ vel malæ fidei.*)

§ 25.

The *bona fide* poſſeſſor, who thinks that he has the property of a thing, and can diſpoſe of it at his pleaſure, is bound to reſtore to the claimant,

I. The thing itſelf, with all its conſequences, ſuch as fruits hanging on the trees, or ſtill ſtanding on the ground.

If he have alienated it, and conſequently no longer poſſeſs

poſſeſs it, he is not bound to reſtore to the claimant the price received for it, even though he may have ſold it dearer than he bought it; but the proprietor muſt ſue the perſon in poſſeſſion.

Nevertheleſs, if the proprietor cannot obtain the thing from the poſſeſſor, becauſe he, for example, may have loſt it, equity requires that the perſon who alienated it reſtore to the proprietor what he has received above the price paid for it.

II. The *bona fide* poſſeſſor is bound to reſtore to the proprietor the fruits which he has got, (in which are included alſo the treaſures which he has found), when theſe fruits are ſtill extant, and the poſſeſſor is enriched by them; but he is no wiſe bound to make good to him the fruits received and ſpent, and far leſs thoſe that he might have received, (*fructus percipiendos.*)

Neither is it neceſſary to make a diſtinction of theſe fruits, and to examine whether they be natural, civil, or the effect of induſtry, (*naturales, civiles, induſtriales*); for all theſe fruits are become the proper effects of the *bona fide* poſſeſſor from the moment that he has conſumed them, and is not enriched by them: the reaſon of which is, that believing himſelf lawful poſſeſſor of his effects, he alſo thought he might diſpoſe according to his pleaſure of their fruits. It is even preſumeable, that he would not have conſumed them if he had thought that they did not belong to him, and that he would ſometime be obliged to reſtore them.

As to the fruits which have enriched the poſſeſſor, if he poſſeſs them during the time requiſite for preſcription, they cannot afterward be redemanded from him, ſince they are his by uſucapion or preſcription.

What has been ſaid of fruits, is alſo to be underſtood of the intereſts of capital ſums belonging to another, which the *bona fide* poſſeſſor has laid out.

One who intents this action needs not mention

fruits, becauſe they are included by right in the ſentence, the judge being equally obliged to take cogniſance of them whether it be a *bona fide* or a *mala fide* poſſeſſor.

III. A *bona fide* poſſeſſor is not bound to make good the damage or waſte that has happened to the thing, becauſe being in the belief that the thing belonged to himſelf, he might neglect and waſte it.

IV. Far leſs could he be obliged to be anſwerable for events happening by mere chance. If then a thing periſh fortuitouſly, it would be loſt to the proprietor, (*res enim perit ſuo domino.*)

§ 26.

V. In caſe the *bona fide* poſſeſſor have laid out any expenſes on the thing which he is obliged to reſtore, a diſtinction muſt be made whether they be neceſſary, uſeful, or done only for pleaſure and conveniency, (*impenſæ neceſſariæ, utiles, voluptariæ.*)

1.) If the expenſes laid out by the poſſeſſor be neceſſary, that is to ſay, if they were laid out for the preſervation of the thing, he may demand reimburſement, even though what was done no longer exiſt; and for ſecurity of his reimburſement he has a right of retention, (*jus retentionis.*)

2.) If the expenſes be uſeful, he may alſo recover them, though the melioration no longer exiſt; but he has not a right of retention for them; and if he want to be reimburſed, he muſt demand it of the proprietor by a ſeparate action, (*ſeparata actione.*)

3.) But if the expenſes which the poſſeſſor has laid out were only for the poſſeſſor's pleaſure and conveniency, he cannot demand reimburſement; but he may carry off what he has cauſed to be done, provided he can do ſo without endamaging the thing.

If he had then, for example, cauſed ſome apartment to be painted, he could not deface the painting. Moreover,

over, that ſort of meliorations could not be taken into conſideration, even though it were pretended that they were the occaſion of the eſtate being ſold, or let to greater advantage.

If the claimant and proprietor of the thing claimed want to keep the meliorations made for pleaſure, or for conveniency, which the poſſeſſor may carry away, he ſhall be obliged to leave them, and to be ſatisfied with the value they might yield after being carried away, which ſhall be determined by perſons of ſkill.

But the *bona fide* poſſeſſor, who poſſeſſing a thing with the proprietor's conſent, may have laid out thoſe pleaſurable expenſes with his approbation, would have a right of retention, till thoſe expenſes were reimburſed to him.

This rule, nevertheleſs, admits an exception in the following caſes.

1.) When the proprietor has not power to give his conſent to them, as when he is a minor under age.

2.) When it is a huſband who lays out that ſort of pleaſurable expenſes on the dotal fortune, and with his wife's approbation; for if the dotal fortune happen to be redemanded, the huſband can neither exact reimburſement of thoſe expenſes, nor carry off the meliorations.

In caſe the *bona fide* poſſeſſor reſtore the thing to the proprietor, without demanding the expenſes of meliorations, he may nevertheleſs afterward ſue him to obtain his indemnification, and intent the action *in factum*, or that which is called *condictio ſine cauſa*, becauſe the proprietor cannot be enriched out of another's fortune.

When the *bona fide* poſſeſſor is ſued, and the cauſe debated, he ceaſes from that moment to be in *bona fide* poſſeſſion; but with reſpect to the time preceding the litigation, he cannot be regarded and obliged but as a *bona fide* poſſeſſor.

When the ſum for meliorations and expenſes are determined by ſentence, the reſtitution of the thing cannot be retarded by any applications for redreſs againſt the ſentence, which ſhall have no other effect than what is called devolved, *(quoad affectum devolutivum.)*

§ 26.

A *mala fide* poſſeſſor, who poſſeſſes, without the proprietor's conſent, a fortune which he knows is not his own, is bound to much more.

1.) A perſon is regarded as a *mala fide* poſſeſſor, who knowing that a thing does not belong to him, nevertheleſs alienates it, and ceaſes conſequently to have the poſſeſſion of it.

2.) When poſſeſſing a thing which belongs to another, it happens that the proprietor demands it, and the cauſe is debated, one is reckoned a *mala fide* poſſeſſor after the litigation or debate of the cauſe.

If then the demand were made without litigation, a man would not ceaſe thereby to be in *bona fide* poſſeſſion; and if afterward the proprietor raiſe a new proceſs againſt the poſſeſſor, and a litigation enſue, the latter would nevertheleſs not be reckoned a *mala fide* poſſeſſor at the time preceding the litigation.

3.) A man who buys a thing which he knows not to belong to the ſeller, is eſteemed a *mala fide* poſſeſſor, even though he have bought it at an auction, or in a fair, and though he have declared his intention to ſell it to the proprietor; ſo that in ſuch a caſe he has not even a right to redemand the price of the purchaſe.

There are ſome exceptions to be made to this rule: The firſt is, when the purchaſer, by buying a thing, preſerves it, whereas it might otherwiſe have periſhed; for example, when he buys a thing which was ſtolen from the proprietor, or taken by the enemy.

The ſecond, when its price has been employed for the proprietor's advantage. And

The

The third, when the proprietor would himſelf have been neceſſitated to lay out for the preſervation of the thing the expenſe which the purchaſer has done; of this order is, for example, what is expended for the keeping of a ſtolen horſe.

§ 27.

I. A *mala fide* poſſeſſor is bound to reſtore to the claimant or proprietor the thing with all its conſequences and dependencies.

If he have alienated the thing before the proprietor made his claim, and before the cauſe was debated, he ſhall be bound to pay its true price, the laws granting for this purpoſe a beneficial claim of right to the proprietor. If the alienation were made after litigation, the *mala fide* poſſeſſor ſhall beſides be liable for all damages and intereſt, ſuch as the proprietor might prove by the oath called *in litem*. Moreover, the latter ſhall continue his proſecution by virtue of a direct claim of right. He is alſo at liberty to ſue the new poſſeſſor of the thing; and even though he have already got the price, he may claim the thing itſelf.

II. The *mala fide* poſſeſſor is obliged to reſtore all the fruits, not only ſuch as are extant, but alſo ſuch as he has already conſumed, and even what a good œconomiſt might have drawn from the thing of which he is in poſſeſſion, without making the diſtinction of fruits natural, civil, or ariſing from induſtry, (*naturales, civiles, induſtriales.*) This takes place, even though he had bought or acquired it in another manner, and for value. Beſides, neither can he acquire by preſcription the fruits received.

It is alſo in conſequence of theſe principles, that a man, who knowing that the money which he poſſeſſes belongs to another, nevertheleſs retains it, is obliged to pay intereſt for it, though he have received none himſelf.

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The *mala fide* poſſeſſor has nevertheleſs a right to take payment of what he has neceſſarily expended for the preſervation of the thing; he has even, for this purpoſe, a right of retention on the thing, unleſs he has ſtolen or taken it by force, or got poſſeſſion of it by any other ſort of violence. For, in this caſe, whatever expenſe he may have laid out, he can demand none of it.

As to beneficial expenſes, the *mala fide* poſſeſſor can demand no reimburſement of them; but he has a right to take away the meliorations, if that can be done without endamaging the thing.

And with reſpect to expenſes laid out only for pleaſure, neither is the proprietor obliged to reimburſe them; the *mala fide* poſſeſſor can neither deduct them, nor demand them in a ſeparate action; he has only the liberty of carrying off and taking back what he has cauſed to be done, if he can do ſo without endamaging the thing. If he do not, and deliver the thing to the proprietor, without reſerving to himſelf that liberty, he cannot afterward obtain it.

There is no doubt but every poſſeſſor, whether *bona fide* or *mala fide*, is bound to be accountable for the fruits which he has reaped and received, in ſo far as he is obliged to reſtore them to the proprietor, and conſequently that the latter has a right to compenſate it with the meliorations of which the poſſeſſor may demand reimburſement, the proprietor not being obliged to pay the expenſe of meliorations, but in as far as it exceeds the value of the fruits received.

It would be otherwiſe, if the poſſeſſor had a right to make the fruits his own. A wife then, who, after the diſſolution of her marriage, redemands her portion, cannot compenſate the fruits received by her huſband with the meliorations which he has made. For the ſame reaſon, the heir called *fiduciarius* cannot object to the heir *feoffee in truſt* the exception of compenſation,

penſation, and pretend to compenſate the meliorations which the latter made by the fruits which he received, at the time when, being not as yet obliged to reſtore the ſucceſſion, he had a right to enjoy it.

III. The *mala fide* poſſeſſor, who, by fraud or by a palpable fault, *(dolo vel lata culpa)*, occaſions any damage to the thing, is obliged to indemnify the proprietor, and to be accountable to him for all damages and intereſt, which he may prove by his own oath *in litem*. If the damage were only occaſioned by a ſlight fault, *(levi culpa)*, the poſſeſſor ſhall be bound to pay only the real value of the thing, which the proprietor is to prove.

And if the thing be endamaged fortuitouſly, the poſſeſſor cannot be liable for any indemnification, unleſs it appear that the accident would not have happened, if the poſſeſſor had at firſt reſtored the thing to its true owner.

But if the poſſeſſor have acquired the thing only in way of theft, of plunder, or of any other ſort of violence, he is liable for mere chances, and for all damages and intereſt, which the proprietor can prove by his own oath *in litem*.

IV. What has been ſaid of the obligations of a *mala fide* poſſeſſor takes place, even when the thing happens to periſh entirely in his hands.

§ 28.

If after the death of a *mala fide* poſſeſſor, his heirs alſo poſſeſs the thing with the like preſumptive injuſtice, they are under the ſame obligation as he.

But when the heir of a *mala fide* poſſeſſor has himſelf poſſeſſion preſumed juſt, a diſtinction muſt be made, whether the proprietor having raiſed a proceſs againſt the defunct, the cauſe was debated or was not. In the firſt caſe, the heir, though a *bona fide* poſſeſſor, is as much bound as the defunct, because,

cauſe, by the litigation, there has intervened between this laſt and the proprietor a kind of ſuppoſed contract, which binds the heir; nevertheleſs, there is this difference between the *mala fide* poſſeſſor and his heir, that the oath *in litem* does not take place againſt the latter. In the ſecond caſe, when the cauſe has not been debated with the defunct, his heir can only be obliged to reſtore the thing with which he was enriched by the defunct's deed, (*facto defuncti locupletior.*)

When the *mala fide* poſſeſſor has ſold the thing after litigation, his heir, though in *bona fide* poſſeſſion, is bound for the whole (*in ſolidum*); but, if the cauſe were not yet litigated with the defunct, the heir would only be obliged, ſo far as he became enriched by the alienation of the thing made by the defunct.

When the heir himſelf has alienated the thing, the claim of right is by no means competent againſt him; if he had a *bona fide* poſſeſſion; but, if his poſſeſſion were *male fide*, or if the cauſe were litigated with him, he ſhall be treated as any other *mala fide* poſſeſſor.

§ 29.

The beneficial claim of right (*revendication utile*) mentioned above in § 4. is not founded on direct property, but on that kind of property which the civil laws have introduced, and in behalf of which they have alſo granted a real action.

Among theſe properties are,

1.) The beneficial property, (*dominium utile*), which the laws have given to one whom they call *ſuperficiarius*, (who hath built on another's ground, paying a rent to the proprietor of the ground), to the tackſman in a long leaſe, to the vaſſal, and to the grantee *, when he acts in his own name.

2.) Suppoſed property, (*dominium fictum*), which takes place when debtors alienate their effects to defraud

* *Ceſſionaire*, here tranſlated *grantee*, ſignifies in French either the perſon who makes a ceſſion, or the perſon in whoſe favour it is made.

their

their creditors, or when a perſon who is not proprietor of a thing, but who finds he has the conditions requiſite to make it his own by preſcription, (*in conditione uſucapiendi*), happens to loſe it. In both caſes, the law ſuppoſes a right of property where it is not in reality, by cauſing to be regarded, on the footing of proprietor, the creditors of a debtor who alienates to defraud them of what he owes, and one who not being the owner of a thing, loſes it before he could make it his own by preſcription. They have both a real action, which is not called a beneficial claim of right, but which take their names from their authors. That which takes place in the firſt caſe, bears the name of a Paulian action, (*actio Pauliana*); and that which takes place, in the ſecond caſe, a Publician action, (*actio Publiciana.*)

3.) The civil property which a huſband acquires to his wife's portion, ſo far as it conſiſts of immoveables.

4.) In fine, among that ſort of properties are thoſe which the laws grant out of a principle of equity, in giving to certain perſons the effects of a property which they have not; as they do, for example,

a) When guardians, curators, and adminiſtrators of churches, of eccleſiaſtical communities, and of city-treaſuries, buy any thing, in their own proper and private name, with the money of their pupils, minors, eccleſiaſtical communities, and cities.

b) When a third perſon buys any thing in his own proper name, with money belonging to ſoldiers actually in the ſervice.

c) When a huſband purchaſes a thing, and, laying out upon it the money of which his wife made him a preſent, he is afterward incapable to reſtore the portion; in which caſe the wife is regarded ſubſidiarily (*in ſubſidium*), as being proprietor of the thing

bought with her money, and may, conſequently, if it exiſt, intent the beneficial claim of right.

d) See the other caſes, which are enumerated in the Frederician Code, part IV. p. 292. § 44.; and obſerve, that, excepting the caſes juſt mentioned, there is no property, and conſequently, on every other occaſion, there is no room for the beneficial claim of right.

§ 30.

A perſon who wants to intent an advantageous claim of right, needs not prove the property, but it is ſufficient if he prove the foundation of the right which he claims; wherefore one who can ſue by virtue of the action called Paulian (*Pauliana*), needs prove nothing elſe, but that the thing was alienated to defraud creditors; the grantee, that the thing was yielded to him; the leaſeholder that the eſtate was given him in a long leaſe, *&c.*

§ 31.

Moreover all that was regulated in treating of the direct action for the reſtitution of the thing, of the fruits, of the meliorations, *&c.* and eſpecially with reſpect to the obligations of heirs, takes place in the uſeful claim of right.

§ 32.

When the claimant's right of property is diſcovered by a ſentence, and the thing adjudged to him, it ought to be delivered immediately, with all its dependencies, and, in caſe of refuſal by the defender, he ſhall be proceeded againſt in the way of execution, as is preſcribed in the Frederician Code.

If the thing adjudged be moveable, it ſhall be delivered in the very court-place, and ſhall be brought thither at the defender's coſt, in caſe it be elſewhere, and the claimant require it.

But

But if the queſtion be concerning an immoveable thing, it is evident, that it muſt be reſtored in the very place where the thing is ſituated, (*in loco rei ſitæ.*)

§ 33.

When the poſſeſſor will not reſtore the thing, he muſt pay its value to the proprietor, ſuch as the latter ſhall have determined it by his own oath *in litem*, or elſe the proprietor ſhall be put in poſſeſſion of the thing by an execution.

ART. II.

Of the action of exhibition, (ad exhibendum.)

§ 34.

IT has been laid down for a foundation in the preceding title, that a claim of right takes place only againſt the poſſeſſor of a thing belonging to another, and that conſequently the demandant ought to prove that the defendant poſſeſſes it.

§ 35.

As it may happpen that a proprietor, though he have no certainty that the perſon whom he intends to ſue poſſeſſes the thing belonging to him, may nevertheleſs have well-grounded preſumptions that he is in poſſeſſion of it, we have, in this caſe, granted to the proprietor a particular action, by which he may oblige the perſon whom he preſumes to be in poſſeſſion of the thing, to produce it, if he really have it, and to exhibit it publicly and in court, that he may ſee it, touch it, and examine it, and judge by that examination if it be really his, that he may redemand it: this action which is perſonal, is called an action of exhibition, (*ad exhibendum.*)

§ 36.

Moreover, it is not a ſufficient ground for raiſing this action, that one have in general an intereſt in the thing, but it is requiſite that he who demands exhibition of it have a particular and perſonal intereſt in it: wherefore alſo this action does not take place, when one wants to have a free man produced, becauſe, in this caſe, the demandant is not intereſted in a proper and particular manner.

§ 37.

Neither is it ſufficient, that the demandant have an intereſt in the thing, when he begins the ſuit, but that intereſt muſt ſtill ſubſiſt at the time of its determination.

§ 38.

The laws grant this action not only to ſuch as have a real right, but alſo to ſuch as may intent a perſonal action to obtain the thing, or demand an interdict of reſtitution, or prohibition, *(interdictum reſtitutorium vel prohibitorium)*, becauſe it is alſo their intereſt that the thing for which they ſue, or of which they want to have poſſeſſion, be exhibited to them.

Such as have a right to ſue by virtue of an exhibitory interdict *(ex interdicto exhibitorio)*, have not the action *ad exhibendum*, by reaſon that they may obtain exhibition of the thing, by virtue of this interdict itſelf, and conſequently need not an action *ad exhibendum* to obtain it.

§ 39.

Such as have not the right of redemanding a thing, but who, nevertheleſs, have an intereſt in getting it produced, have not indeed a direct action of exhibition, but they have the ſerviceable action of that name, or elſe the action called *in factum*. For example, if one have received a legacy, which depends on the choice which Caius ſhall make among ſeveral things,

things, he may ſue to have them produced, that Caius may chuſe; ſo that though he cannot, before Caius's choice, claim the thing, he has, nevertheleſs, a right to intent an action of exhibition.

§ 40.

The demandant ought to prove the intereſt which he has in the thing, and the judge ought to take cogniſance of it, and declare whether indeed he have it. But it is ſufficient that the proof be taken ſummarily, and that the demandant give oath upon his intereſt, if he cannot prove it in another way. For no prejudice is occaſioned to the defender, by obliging him to produce the thing, if, after exhibition, it be found that the demandant has no right to it; and, in caſe he then allege objections of tedious diſcuſſion (*altioris indaginis*), the judge ſhall refer the examination of it to the time when the principal affair ſhall be debated.

§ 41.

An action of exhibition, *ad exhibendum*, is then only a preparatory action; for it is only after exhibition of the thing, that the claimant is in a condition to judge whether he can claim and ſue for it at law.

1.) Thence it follows, that the claim and action of exhibition may be joined and combined together; and,

2.) That the perſon who has a mandate and full power to ſue the principal cauſe, has alſo a right to raiſe an action *ad exhibendum*.

§ 42.

This action takes place againſt ſuch as can produce the thing which ought to be exhibited, whether they poſſeſs it for themſelves or in the name of another; and this is the reaſon why that action, though perſonal, is called *in rem ſcripta*. It is ſufficient even that they can produce it at the time of pronouncing ſentence.

§ 43.

§ 43.

When a man who poſſeſſes a thing ſhall maliciouſly put it out of the way, that he may not be obliged to produce it, he ſhall be liable for all damage and intereſt which the demandant can prove by his own oath *in litem.*

But this action ſhall not take place if he put away the thing honeſtly before the cauſe was debated; or if the thing periſhed by accident, *(caſu)*, unleſs it were evident that this accident would not have happened at the demandant's houſe, if it had been produced and delivered to him immediately after the action was raiſed.

§ 44.

This action likewiſe takes place againſt heirs, in ſo far as they poſſeſs the thing which ought to be exhibited. If the defunct had put it away fraudulently before litigation, they would only be liable ſo far as they were enriched thereby. If then the defunct had, for example, ſold the thing, the price which he would get for it ſo far enriches the ſucceſſion.

§ 45.

An action of exhibition, *(ad exhibendum)*, only takes place for moveables, in which are included alſo wills, codicils, and other deeds or documents.

§ 46.

A perſon is obliged, by virtue of this action, to produce alſo to the proprietor the things of which he has loſt, in any way, the property, by ſpecification, or acceſſion, *&c.*; but this is underſtood, when the two materials may be ſeparated, and the proprietor demands to be put in a condition to claim the part of the ſubject which belongs to him.

From this rule are excepted the materials uſed in a building.

§ 47.

§ 47.

Exhibition of the thing ought to be made in the place where it is, when the action is raiſed to get it produced, and both the coſts and hazard of the exhibition fall on the demandant.

Which would ſtill more take place, if he demanded the thing to be produced in another place, and if in the tranſportation it happened to be damnified, or even to periſh entirely.

§ 48.

An action *ad exhibendum* does not take place for things immoveable, becauſe being always expoſed to view, they have no need of exhibition in order to be known. But as it may happen that the demandant ſhould want to claim lands, which, he ſays, are mixed with other lands, and of which conſequently he does not know, and cannot deſcribe the ſituation, in this caſe the following diſtinctions muſt be made. Either the defender denies his having ſuch lands in his poſſeſſion, and in that caſe the demandant is obliged duly to prove his allegations; but if he in any wiſe make good his pretenſions, the defender cannot be excuſed from producing to him his papers and documents. Or the defender owns, that he has among his lands lands like to thoſe which the demandant claims; and in this caſe the proceedings muſt be, as is preſcribed above in the title of a claim of right *.

§ 49.

The effect of an action of exhibition is only to oblige the poſſeſſor to exhibit the thing in queſtion, but not to reſtore it, unleſs the poſſeſſor, after being ordained to exhibit the thing, offer of himſelf to reſtore it, without waiting till a claim of right be raiſed againſt him.

* See art. I. above

When

When the defender has been ordained to exhibit the thing, he ought to produce it, ſuch as it was when the action was raiſed; and if during the proceſs. the thing fell under preſcription, that would in no wiſe hurt the claimant.

If the poſſeſſor make oath, (*jurato*), that he has not in his hands the thing which ought to be produced, he ſhall be allowed a ſufficient ſpace to exhibit it; but if he do not comply with the exhibition at the day appointed, the thing ſhall be held as exhibited, and conſequently the claim of right ſhall take place againſt him; if the defender deny that he has the thing, and he be afterwards convicted of having it in his poſſeſſion, or if he refuſe to produce it, after being ordained ſo to do, he may be obliged, in his quality of poſſeſſor of the thing, to reſtore it with all damages and intereſt, which can be proved by the oath *in litem*, which is competent againſt him.

§ 50.

When the demandant has once been caſt in his demand, he cannot a ſecond time raiſe an action of exhibition for the ſame cauſe, (*ex eadem cauſa*), unleſs other circumſtances have occurred, which may cauſe that action to be allowed.

§ 51.

When, in an action of exhibition, the oath *in litem* is admitted, and conſequently the demandant has got all his damages and intereſt, there is no longer place for a claim of right.

ART.

ART. III.

Of the action competent to a perſon, who having a thing in common with another, wants to have a diviſion of it.

(De actione communi dividundo.)

§ 52.

WHen there are ſeveral proprietors of a thing, none of them can make any alteration in it, without the conſent of the whole, according to the known rule, That in things common the ſentiments of the perſon who wants no alteration, carry it againſt thoſe of the other proprietors, (*quod in cauſa communi melior ſit conditio prohibentis.*)

§ 53.

The natural reaſon of this deciſion is, that a common thing is equally ſo with reſpect to all its parts, without excepting even the ſmalleſt of them; ſo that a perſon who would make any alteration in it, were it even very ſlight, would alone diſpoſe of a thing in which others have as much right as he.

Whence it follows alſo, that the form (*ſpecies*) of a common thing cannot be changed againſt the inclination of the other proprietors; for the ſame reaſon, when a thing has more than two proprietors, alterations cannot be made in it by plurality of voices, and the opinion of the objector ought to prevail.

§ 54.

From this rule muſt be excepted the caſes following:

1.) When a common thing wants neceſſary indiſpenſable reparations. In this caſe a perſon who will not conſent, may be obliged, by authority of the judge,

to contribute his ſhare of the charges of reparation.

2.) When one of the proprietors only uſes the thing according to its deſtination, in which caſe the others cannot object to that uſe, nor prohibit it, the firſt having againſt them the interdicts *uti poſſidetis*, *de vi*, *&c.*

3.) When one of the proprietors makes any alterations which no way hurt the reſt, but which rather are uſeful for the ornament of the thing, or manifeſtly for its advantage; for example, if he cauſe a houſe in joint property to be painted, *&c.*

4.) In general, when it is the public intereſt that the alteration prohibited by one of the proprietors be made.

5.) When one of the proprietors makes any alteration in the common thing, the other proprietors, ſuppoſing they have been informed of it, and have kept ſilence, cannot afterward oblige him to reſtore the thing to its firſt ſtate.

On the contrary, it would be otherwiſe, if the alteration were made in their abſence, and without their knowledge, in which caſe things muſt be put again in the ſtate in which they were before.

6.) When without hurting the thing in joint property, and without changing its form, one of the proprietors does certain things; for example, if he alienate his ſhare or claim, the others cannot hinder him from ſo doing.

§ 55.

The prohibition of making any alterations in a common thing may take place, either by petition to the judge for his interpoſition, (*officium judicis*), or by ſuing in virtue of the interdict *Uti poſſidetis*; but it muſt be done before the cauſe be debated; for if the action *communi dividundo* were once raiſed, no ſuch prohibition can afterward be made, and the effect of the ſuit muſt be waited.

§ 56.

§ 56.

But as it would be hard that a proprietor, who poſſeſſes a ſubject in common with others, could not renounce that poſſeſſion, which is often a ſource of quarrels and law-ſuits, and that he ſhould be out of condition to meliorate the ſhare that he has in the common ſubject, the laws allow each of the proprietors to demand that the common ſubject be divided in virtue of the action called *communi dividundo.*

§ 57.

This action is either direct or advantageous. The direct action is allowed to ſuch as are real proprietors, (*veri domini*); among whom are alſo reckoned ſuch as have acquired the property either by preſcription or in virtue of a legacy, (*per uſucapionem vel ex legatis.*)

The advantageous action is allowed to ſuch as poſſeſs in common a ſubject, in which they have only the advantageous property, (*condomini utiles*), or who have any other real right in common. It is allowed conſequently,

a) To the leaſeholder; in which caſe the diviſion takes place only with reſpect to the payment of the rents, and not with reſpect to the lands *(pro regione.)*

b) To the vaſſal, even though the ſuperior ſhould not conſent to the diviſion.

c) To the perſon called *ſuperficiarius*, when he demands a diviſion of the ſurface.

d) To a perſon who claims, by an action called *publiciana in rem*, the poſſeſſion of the portion which he has loſt.

e) To ſuch as have in common either an uſufruct; or,

f) A pledge; or,

g) A right of paſturage.

h) And as all the creditors ſhare the advantage which one of them gets by being put in poſſeſſion of a ſub-

ject belonging to their debtor, each of them may demand a diviſion of that ſubject.

i) Moreover, if the thing which is common happen to periſh, and if one of the proprietors have laid out expenſes for its preſervation, he may redemand them from the reſt, in virtue of this action, which may be alſo raiſed againſt the perſon who has endamaged the ſubject, although it afterward periſh.

§ 58.

The direct action of *communi dividundo* is then allowed to ſuch as have the real property of a ſubject, *(rerum dominium)*, which they have in common with others, and who, having the free diſpoſal of their effects, want that it ſhould be divided.

Thence it follows, that pupils, minors under age, furious and fatuous perſons, and others who have not the free adminiſtration of their effects, cannot demand a diviſion of a common ſubject, even though their guardian ſhould conſent to it, but the guardian alone muſt make the demand; and if they be minors under age, it is requiſite that the curator ſign along with them; the diviſion nevertheleſs cannot take place till the affair be examined, and a decree or permiſſion to alienate be pronounced.

§ 59.

Neither minors under age, who have obtained a diſpenſation, nor gentlemen below twenty-five years, though by virtue of our ordinance they are to be regarded as of age at twenty years, can demand the diviſion of a common ſubject, but by conſent of their curator, and upon a decree or permiſſion to alienate.

This action may be raiſed againſt all ſuch as have a thing in common with the demandant, even though they were pupils, furious or fatuous perſons, minors under age, and others who have not the free adminiſtration of their own effects.

If

If the perſon who demands the diviſion be of age, there is even no need of a decree or permiſſion to alienate.

None of the proprietors can oppoſe the diviſion, even though, a) They had agreed not to divide the common ſubject; b) Though the agreement had been confirmed by oath; or, c) Though they may have had the ſubject in common for thirty years and more.

It muſt be obſerved on this occaſion, that when two proprietors of the ſame thing demand that it be divided, he is reckoned demandant who firſt raiſed the action for obtaining a diviſion.

§ 60.

By this direct action, a diviſion can only be demanded of particular things, or individuals, moveable or immoveable: conſequently, by virtue of this action, it cannot be demanded that a ſucceſſion, or the effects of a ſucceſſion, ſhould be divided.

This action alſo takes place, though the proprietor, who demands the diviſion of the common ſubject, do not poſſeſs it, and though it be in the power of the other: it would alſo take place, even though this laſt had ſold it; for, on account of his fraud, he would be held as poſſeſſor. Nevertheleſs, that would not hinder the demandant from having power to redemand the ſhare from the buyer himſelf: but, with reſpect to the ſeller's ſhare, the bargain would ſubſiſt, and the proprietor could not claim a preference.

§ 61.

This action does not take place, when, by the diviſion, the ſhare of one of the proprietors might be waſted, or even rendered uſeleſs. For example, if two houſes ſhould have but one common entry, and if one of the proprietors ſhould demand a diviſion of them, none of them could make uſe of the right of entry.

§ 62.

Neither does this action take place when a thing

is common, not in virtue of a right of property, but in virtue of a perſonal obligation. For example, when the ſame commiſſion is given to two perſons, or when a depoſit is intruſted at the ſame time to two perſons, or when two perſons bind themſelves for the whole in a bill of exchange, or in a bond, or even when they poſſeſs a thing in common, but *mala fide*, *&c.*; in which caſes the diviſion does not take place, and each continues bound for the whole.

§ 63.

By virtue of this action the common ſubject is divided, each of the proprietors has his ſhare allotted to him, and the common property is annulled.

It is proper to remark, that, beſides the property, all the perſonal burdens *(præſtationes perſonales)* are to enter into the diviſion. Conſequently, in making the diviſion, muſt be taken into conſideration the fruits and profits, which ſome of the proprietors have enjoyed, and are to communicate, or the expenſes which they have laid out for the benefit of the common ſubject, and are to recover, or the damages and loſs which they have occaſioned by their fraud or ſlight fault *(dolo vel levi culpa)*, and for which they are bound.

§ 64.

The laws allow the advantageous action of diviſion of commons, *de communi dividundo*, to ſuch as without having a right of property have ſome other real common right.

§ 65.

Moreover, all that has been enacted with reſpect to the direct action takes place alſo with regard to the advantageous action.

Theſe two actions are mixed; by which is underſtood, that, on one ſide, they are to be referred to real rights *(adjus in re)*, in ſo far as concerns the diviſion of the right of property, or any other real right;

right; and that, on the other ſide, they belong alſo to perſonal obligations, ſo far as, in virtue of theſe actions, perſonal burdens, meliorations, damages, and expenſes, are brought into the diviſion.' This perſonal obligation ariſes from a ſuppoſed contract, and is founded on this, that no one can enrich himſelf to the prejudice of another.

§ 66.

The action of diviſion of commons, *communi dividundo*, may be raiſed ſeveral times; for example, when, after being already raiſed, there are yet other common ſubjects to divide, in which it differs from an action *familiæ erciſcundæ*.

§ 67.

If one of the proprietors be wronged by the diviſion, he cannot demand a new diviſion, unleſs the wrong exceed the half of the real value of the common ſubject. The reaſon of this is, that, if regard be had to leſs atrocious wrongs, a great number of law-ſuits might thereby be occaſioned.

Obſerve on this occaſion, that all that has been ordained in the title where we treat of the diſannulling of ſales, *(de reſcindenda venditione)*, takes place with reſpect to the diviſion of a common ſubject, eſpecially what was regulated in favour of the defendant, to wit, that he is at liberty to perfect its value: moreover, diſannulling of the diviſion may alſo be demanded by an action *de communi dividundo*.

§ 68.

When the parties concerned in the diviſion cannot agree among themſelves, they ſhall apply to the judge, who ſhall begin with trying all imaginable methods to make the parties hearken to reaſon, and to agree them amicably.

1.) In caſe the agreement do not take place, it is the

the judge's duty, when there are ſeveral things to divide, to allot ſome of them to each of the copartners, by adjudging one thing to one, and another thing to another.

2.) If a land-eſtate be the ſubject of the diviſion, he may alſo aſſign to each his ſhare of it, if a convenient and proper diviſion be made.

3.) But in both caſes, the perſon who has received more than ought to fall to him, is obliged to make ſhares equal by returns in money or otherwiſe.

4.) When the grounds, or common eſtate, cannot be divided conveniently and properly, it ſhall be delivered to one of the copartners, who ſhall make good the ſhare of each of the others by returns in money or otherwiſe.

5.) When the copartners cannot agree among themſelves on the price of ſuch a ſubject, it ſhall be put to public auction, and the price which ſhall be drawn divided among them proportionally. But, beſides, none of the joint proprietors, not even the perſon who has the greateſt ſhare, can claim a right of preference, or a right of redemption *(jus reluendi.)*

6.) The judge may alſo conſent to make the diviſion by lot, if this method be agreeable to all concerned.

7.) When a thing has been engaged for the whole to two creditors, the diviſion ſhall not be made according to the value of the pledge, but in proportion to their debt.

8.) When a pledge is allotted to one of the creditors, that does not hinder the debtor from redeeming it, by paying what he owes.

9.) In order to proceed to a diviſion deliberately, the judge ſhall cauſe an exact inventory to be drawn up of all the things to be divided, and ſhall have them appraiſed, or eſtimated, by ſkilful perſons upon oath, which

which appraiſing ſhall be made according to the quality and goodneſs of each thing.

§ 69.

An action of diviſion of commons, *de communi dividundo*, would not be incompetent, even though the common had ſubſiſted above thirty years, or even though one of the proprietors, having formerly demanded a diviſion of the common ſubject, and having afterward deſiſted from his demand, on account of the oppoſition of the reſt, thirty years were elapſed after the oppoſition.

TITLE V.

How the property (dominium) *of a thing is acquired, according to the law of nature, or of nations.*

(De modis acquirendi dominii jure gentium.)

§ 1.

THE property of a thing is acquired according to the law of nature or of nations,

1.) By ſeizing and apprehending a thing which has no owner, (*per occupationem rei nullius.*)

2.) By making of foreign materials a new ſpecies or form, which cannot be reſtored to its firſt ſtate, (*per ſpecificationem.*)

3.) By making out of ſolid or liquid materials, of which part belongs to ourſelves and part to another, a new ſpecies, to which its firſt form cannot be reſtored, (*per commixtionem et confuſionem.*)

4.) By adding to a thing which belongs to us, and is the principal thing, (*rei prævalentiori*), another thing which is leſs principal, (*minus valens*), and which does

not belong to us. See art. IV. § 25. And it is alſo to this method of acquiring a right of property that the purchaſe made of it muſt be referred, when a perſon builds an edifice upon another's ground; as alſo when one writes any thing valuable or rare upon another's pocket-book, or when one paints a picture of value upon a canvas which does not belong to himſelf. See below, art. IV. § 6. in the end.

5.) The right of property is alſo acquired with reſpect to what is planted or ſown upon another's ground, (*jure ſoli.*)

6.) The property of a thing is alſo acquired by taking it from an enemy.

7.) Alluvion (or that increaſe of ground occaſioned by the overflowing of a river) is alſo a method of acquiring a right of property; and when we ſhall treat of it, we ſhall alſo mention the pieces of earth, (*cruſta*), which are ſometimes carried off from lands, the new iſles, and channels which rivers have forſaken, (*de alveo deſerto.*)

An 8.) method of acquiring the property of a thing, is, for example, gathering the fruits of a tree which does not belong to us, or reaping a neighbour's field.

A 9) method is, when one of our female beaſts is impregnated by a male which does not belong to us, (*jure ventris.*)

A 10.) method is, when one delivers a thing to another, by virtue of a proper title to transfer the right of property, (*ex titulo dominii tranſlativo.*)

11.) In fine, a laſt method of acquiring property, is ſucceſſion to a perſon inteſtate.

Theſe methods of acquiring property, according to the law of nature, or of the law of nations, (*modi acquirendi dominii jure gentium*), are to be explained in the following articles.

ART.

ART. I.

Of the acquiſition of property, which is got by apprehending and poſſeſſing a thing which belongs to nobody, (per occupationem rei nullius.)

§ 1.

THE firſt method of acquiring property according to the law of nature or of nations (*jure gentium*), is the occupation or ſeizing of a thing which belongs to nobody, (*occupatio rei nullius*).

§ 2.

It takes place when one lays hold of a thing which has no owner, and takes it under his keeping and power, with intent to acquire the property of it.

§ 3.

I. To acquire a thing in this manner, it is requiſite then, that it have no owner, (*quod ſit rei nullius.*)

According to the law of nature or of nations, (*jure gentium*), all men have a right to make themſelves maſter of ſuch things, and thereby to acquire the property of them.

But as, according to the conſtitution of the German empire and of other ſtates, things which have no owner make part of the royalties, nobody can appropriate them to himſelf in our dominions, unleſs we have granted him ſome of thoſe royalties.

Thence it follows, that nobody can aſſume to himſelf the hunting in our foreſts, nor the fiſhing in our waters and rivers, nor appropriate to himſelf vacant ſubjects, *&c.*; and a perſon who ſhould dare to do ſo, and without making his declaration of it, would

be regarded as a robber or thief, and puniſhed as ſuch.

Thoſe whom we have inveſted with our rights of royalty are impowered to proſecute, in the ſame manner, the perſons who ſhould dare to diſturb them in the poſſeſſion of them.

§ 4.

It muſt however be obſerved, that there are ſtill certain things, which, according to the conſtitution of our ſtates, belong to nobody (*res nullius*), which conſequently belong to the perſon who firſt takes poſſeſſion.

§ 5.

Of this number are, in the firſt place, a treaſure, by which we underſtand money or valuable things, which have been buried or built up in time ſo remote, that the proprietor of them is no longer known.

1.) A man who finds a treaſure in his own ground, alone acquires the property of it.

2.) If he find it in ground which is not his own, and which belongs to a private perſon, he has but the half of it, the proprietor of the ground receives the other half; but, if the ground be public, that half belongs to the exchequer.

3.) If the perſon who finds the treaſure have not diſcovered it by chance, but have ſecretly ſearched for it in his neighbour's ground, by digging the earth or otherwiſe, his ſhare would fall to the exchequer.

With regard to the penalties decreed againſt ſuch as ſearch for treaſures by the aſſiſtance of magic, as they ſuppoſe the truth and certainty of an art which was only a vain ſuperſtition, they ſhall no longer take place.

4.) One may, by an action of exhibition, oblige the perſon who has found a treaſure in his neighbour's ground to produce it; and this proſecution may be made

made by the proprietor or by the fiſcal. After which the proprietor may demand the treaſure in a claim of right.

5.) If a perſon who has found a treaſure deny it, or if he pretend that he has found no more than what he has told, and there be nevertheleſs ſtrong preſumptions that theſe declarations are not true, he ſhall be obliged to purge himſelf by oath, if there be no other proof againſt him.

In the ſecond place, among things which belong to nobody are reckoned ſwarms of bees, which fly away, and on which the owner has not as yet laid hold, which belong to the perſon who firſt ſeizes them.

In the third place, when, in town or in the country, pigeons, whoſe owner is not known, come into our pigeon-houſe, they are ours as ſoon as we are poſſeſſed of them, *(jure occupationis.)* Obſerve on this head, that when ſtrange pigeons occaſion damage in a piece of ground, the proprietor of it may kill them, though he know to whom they belong.

In the fourth place, when, from ſtrange materials, a man makes, in his own name, a new ſpecies, which cannot be reſtored to its firſt form, this new ſpecies belongs to nobody, and he who has made it acquires it by poſſeſſion, *(jure occupationis.)* See the following article. On the ſame principle are founded the acquiſitions made by acceſſion, and by mixtures, *&c.* *(per acceſſionem, commixtionem, confuſionem, &c.)*

§ 6.

II. To acquire the property of a thing which belongs to nobody, it is alſo requiſite that a man take it into his own keeping and power.

It is not ſufficient then to know that a treaſure is buried in a certain place; for if another come and dig

dig it up, he would ſhare it with the perſon who knew of it.

If it happen that a man be in purſuit of a ſwarm of bees, and another gets hold of it, it belongs to this laſt, as to the firſt occupant.

It cannot be ſaid that one is poſſeſſed of things carried off from the enemy, as long as they are not ſecured and brought into our dominions.

§ 7.

III. In fine, to acquire the property of a thing which belongs to nobody, he who ſeizes it muſt do ſo with an intention to acquire it for himſelf.

He then who is employed by the owner of a piece of ground to dig into the earth for treaſure, does not acquire it if it be found, becauſe he does not ſeize it for himſelf and in his own name.

Alſo a perſon who makes, in another's name, a new ſpecies of materials which do not belong to him, does not acquire it though the thing belongs to nobody, by reaſon he has not made the new ſpecies in his own name.

ART. II.

Of the way of acquiring the property of a thing by ſpecification.

(De ſpecificatione.)

§ 8.

THat method of acquiring property, which takes place when a perſon makes of materials which do not belong to him a new ſpecies, or gives them a new form, *(ſpeciem)*, is called ſpecification.

§ 9.

The perſon who has made the new ſpecies acquires the

the property of it by ſpecification, 1.) When he makes it in his own name, and for himſelf. 2.) When the materials of which it is made have ſo changed their form that they cannot be reſtored to their firſt condition.

§ 10.

In order to frame a juſt notion of this method of acquiring property, it muſt firſt be laid down as a principle, that all the things of the earth being compoſed of the ſame matter, their ſubſtance is always the ſame, and that they only differ with reſpect to ſpecies, (*quoad ſpeciem*), as being ſuſceptible of different forms and qualities.

Reſting on this foundation, philoſophers have reckoned, 1.) That the ſpecies, that is to ſay, the form and quality of a thing, are ſo much eſſential to it, that as often as the ſpecies happens to change, the thing itſelf is in ſome meaſure deſtroyed, and loſes its exiſtence *; that conſequently, 2.) All the right which the proprietor had to that figure or form or ſpecies likewiſe ceaſes †; and that, 3.) The new form or figure begins to have its exiſtence only by the deed of the perſon who makes it a new ſpecies; whence they have concluded ‡, 4.) That this new ſpecies belonging to nobody (*res nullius*) was acquired to him who has made it in his own name ‖.

* Nam mutata forma prope interimit ſubſtantiam rei, *l.* 9. § 3. *ff. ad exhib.* quoniam priſtinam ſuam ſpeciem non continet, *l.* 3. § 1. *R. V.* adeoque jus prioris domini quaſi exſtinctum eſt, *l.* 23. § 5. *R. V.*

† Ubi ſimul contribuuntur ex quibus unum emplaſtrum ſit, nihil hic fere ſuum dicere poteſt prior dominus. *L.* 27. § 1. *A. R. D.*

‡ Genera poſſeſſionum tot ſunt, quot et cauſæ acquirendi ejus, quod noſtrum non ſit; velut, &c. quæ ipſi ut in rerum natura eſſent fecimus. *L.* 3. § 21. *ff. acq. poſſ.*

‖ Nerva et Proculus putant hunc dominum eſſe qui fecerit ſpeciem aliquam ex aliena materia, quia quod factum eſt antea nullius fuerat, *l.* 7. § 7. *poſſ. A. R. D.* et ut in rerum natura eſſet fecit, *d. l.* 3. § 21.

In

In this competition of form and matter, (*concurſu formæ et materiæ*), the preference is given to form over matter, with ſo much the more foundation, that thereby no prejudice is occaſioned to the proprietor of the matter with reſpect to its value. See § 12.

This then is the true reaſon, that by ſpecification, confuſion, commixtion, acceſſion, alluvion, change of the channel of a river or rivulet, (*per ſpecificationem, confuſionem, commixtionem, acceſſionem, alluvionem, alveum deſertum*), the property of the new ſpecies formed by theſe different means is acquired, and that lawyers have reckoned them among the methods of acquiring property by the law of nations.

§ 11.

There is no ſpecification, 1.) When to make a new ſpecies its own proper matter is uſed in part, and in part matter belonging to another; this change bearing in law the name of confuſion or commixtion; and the method of acquiring property, by adding to a principal thing (*rei prævalentiori*) another which is leſs ſo, is called *acceſſion*. See art. III. and IV. following.

Neither does ſpecification take place,

2.) When one does not make a new ſpecies in his own name only, but makes it alſo in name of the owner of the materials; in which caſe the property of it is common to both.

3.) There is no ſpecification, in the third place, when the firſt form can be reſtored to the new ſpecies *; and in this caſe the proprietor of the materials has an action of exhibition, by which he may oblige the man who has made the new ſpecies to reſtore it to its

* In omnibus quæ ad eandem ſpeciem reverti poſſunt dicendum eſt, ſi materia manente ſpecies duntaxat forte mutata ſit, veluti ſi ex meo auro ſtatuam, aut ex meo argento ſcyphum feciſſes, me eorum dominum manere. *L.* 24. *ff. A. R. D.* Secus eſt, ſi materia ad priſtinam ſpeciem reverti non poteſt. *L.* 7. § 7. *eod.*

firſt

firſt form, that he may claim it. The action of exhibition may be united with that of claim of right.

4.) In fine, neither is there any ſpecification when the matter which belongs to another does not loſe its firſt form, and when it is only unfolded or cleared from what concealed or covered it, as happens, for example, in threſhing another's corn *.

§ 12.

But as it would be hard, that when a new ſpecies cannot be reſtored to its firſt form, the proprietor of the matter ſhould be a loſer by the deed of a third party, it is juſt that the man who has made a new ſpecies of it ſhould pay the owner its true value, and according as it ſhall be eſtimated by the judge: for this purpoſe, the proprietor of the materials ſhall have a right of retention on the new ſpecies, if it be in his poſſeſſion; but if it be in the power of the other, he ſhall have an action *in factum*.

In caſe that the perſon who has made the new ſpecies of materials not belonging to himſelf were not ignorant that they belong to another, the proprietor would acquire the property of it, ſo that he might redemand it from him who had uſed it in work: but if it were uſeleſs to him, and he did not want it, he might demand the price of his materials from him who fraudulently turned them into a new ſpecies, and determine their value by his own oath *in litem*.

§ 13.

Specification differs from acceſſion in this, that in this laſt manner of acquiring it is ſuppoſed, 1.) That he who uſes a thing in work employs in it his own

* Non debet dubitari quin alienis ſpicis excuſſum frumentum ejus ſit, cujus ſpicæ fuerunt: cum enim grana quæ ſpicis continentur perfectam ſuam habent ſpeciem, qui excuſſit ſpicas non novam facit ſpeciem, ſed eam quæ eſt detigit. *L.* 7. § 7. *A. R. D.*

materials as well as thoſe of another; and, 2.) That one part of the materials exceeds and prevails over the other. See art. IV.

ART. III.

Of the way of acquiring property by commixtion and confuſion.

(Per commixtionem et confuſionem.)

§ 14.

A Perſon who makes in his own name a new ſpecies of materials, of which part belongs to himſelf and part to another, ſo that they cannot again be ſeparated, acquires the property of that part of the materials which did not belong to him. It muſt be obſerved on this occaſion, that the acquiſition of them is made by what is called *confuſion*, if they are liquid materials, and by what is called *commixtion*, if they are ſolid and dry.

§ 15.

The foundation of this acquiſition is the ſame as that mentioned above, § 10. concerning ſpecification. Indeed the preceding ſpecies, in which alone the proprietor of the foreign material had a right, is as it were deſtroyed and annihilated: on the contrary, the new ſpecies, which never belonged to that proprietor, and which began to exiſt only by the deed of the perſon who uſed it, ought to be reckoned among things which belong to nobody, (*res nullius*), and is conſequently his who has uſed it.

§ 16.

But property is not acquired by confuſion and commixtion;

1.) When

1.) When one does not make this mixture for himſelf, nor in his own name, but in name of a third perſon. Note, that if the mixture of the two ſubſtances were made in name of the two proprietors, or happened by mere chance, they would have the property of them in common.

2.) When both the ſubſtances may be fully ſeparated; for example, if gold and ſilver had been blended together. See above, § 11.

3.) When the things mixed are of the ſame nature or ſubſtance, as if oils, or wines, or ſheep, or corn, *&c.* are mixed. The reaſon of this is, that a new ſpecies is not thereby formed, and that the firſt does not periſh, nor ceaſe conſequently to exiſt *.

But if in this caſe one of the things mixed be more valuable than the other, the judge muſt determine what more is to be received by him to whom it belongs, that he may not ſuffer by loſing it. And in caſe he who has made the mixture knew that one of the things mixed did not belong to himſelf, he ſhall be, in puniſhment for his diſhoneſty, deprived of this right of property in his ſhare, and the other may claim the whole mixture; or if he prefer the value of his own ſhare, he may determine by his own oath *in litem*, what he ought further to receive for his part, that he may loſe nothing by it.

This method of acquiring property differs,

1.) From ſpecification, which only takes place when a new ſpecies is made of materials which belong to another. See § 13.

2.) And from acceſſion, which not only has two different materials for its object, but which, at the ſame time, ſuppoſes that one of them prevails and exceeds the other, (*prævalentior.*) See the following article.

* Corpora quæ ex diſtantibus rebus conſiſtunt, conſtat retinere ſingula ſuam propriam ſpeciem, ut ſingulæ oves, indeque vindicari poſſe, ſi aliena miſcetur. *D. l.* 23. § 6.

ART. IV.

Of the method of acquiring property by acceſſion.

(*Jure acceſſionis.*)

§ 17.

THE property of a thing is acquired by acceſſion, 1.) When one adds a thing leſs principal (*rem minus principalem*) to another which prevails over it, (*rei prævalentiori*), and which conſequently is the principal of the two; and, 2.) When theſe things are ſo united together, that they cannot be ſeparated without endamaging them.

§ 18.

Before explaining the grounds of this method of acquiring property, we muſt, I.) In order to form a juſt notion of it, previouſly obſerve, that there is a great difference between a body, an univerſality, a whole, and between the parts or parcels of which the body and the whole are compoſed *.

§ 19.

In fact, there is a great difference between a houſe, or any edifice, and the materials of which the houſe or edifice is compoſed, ſuch as wood, bricks, lime, iron, *&c.*

And indeed ſome rights are competent to the body, or whole, and others to its parts †; for example, one can poſſeſs the body of a houſe, without poſſeſſing the materials, and poſſeſs the materials without having poſſeſſion of the houſe ‡.

* L. 7. § 11. Quod univ. nom. L. 6. § 1. Rer. div.
† L. 30. pr. A. poſſ. L. 23. Uſurp.
‡ D. l. 23. pr. l. 8. quod vi.

Whence

Whence it follows, that a man may get a houſe by preſcription, without getting the materials by preſcription *; and acquire the property of the materials by preſcription, without becoming proprietor of the houſe †.

It may then likewiſe happen, that one may have a right to claim a houſe without the materials, or the materials without the houſe ‡.

It muſt alſo be obſerved, II.) That bodies are diſtinguiſhed into ſimple bodies, (*corpora unita*), and compound bodies, (*connexa*) ‖.

By ſimple bodies (*corpora unita*) are underſtood here ſuch as, making but one ſingle whole, are not compoſed of different things connected and joined to one another, but whoſe parts are, ſo to ſpeak, united together by the ſame ſpirit, as the law expreſſes it, (*uno ſpiritu*); ſuch are, for example, a ſtatue, a man, a ſtone, a beam **.

By compound bodies (*corpora connexa*) are underſtood here ſuch as are compoſed of different things or pieces joined together, which, by that connection, make one ſingle whole; for example, a houſe, a boat, a coat, *&c.* ††

§ 20.

When, in theſe two caſes, materials belonging to two different proprietors are ſo united and joined together, that they afterward make of the whole but one ſingle body, it has been queſtioned by the lawyers to whom the property of that body, or of that whole,

* L. 7. § 21. A. R. D. l. 23. in fin. de rei vind.

† L. 23. pr. et § 2. Uſurp.

‡ L. 23. § 7. R. V. ‖ L. 30. pr. Uſurp.

** Corpus alio ſenſu UNITUM vocatur, quod continetur uno ſpiritu; ut homo, tignum, lapis, et ſimilia, *d. l.* 30. Si ſtatuæ meæ brachium alienæ ſtatuæ addideris, non poteſt dici brachium tuum eſſe, quia tota ſtatua uno ſpirito continetur. *L.* 23. § 5. *Rei vind.* Conf. *l.* 27. § 1. *A. R. D.* ibi: Nihil hic vere ſuum dicere poteſt priſtinus dominus.

†† D. l. 30. pr.

ought

ought to belong. Now, they have decided very rationally, that the acceſſory or ſmaller part ought to follow the greater, and that what prevails (*pars prævalentior*) ought to draw after it the leſs principal part (*partem minus principalem*); that conſequently the property of the leſs principal thing ought to fall to the proprietor of the more prevalent, (*domino rei prævalentioris.*)

§ 21.

The natural reaſon of this deciſion is the ſame as that mentioned in ſpeaking of ſpecification, namely, that the figure or form of things determines their difference, and that conſequently when it happens to change, the ſame thing no longer exiſts.

§ 22.

Thus when a man joins to a ſtatue belonging to him an arm belonging to another, the arm ceaſes to be an arm, and becomes thereby a part of the ſtatue *, conſequently it is comprehended under the whole or ſimple body (*corpore unito*) of the ſtatue. And as in this manner the arm loſes the form it had before, and changes its ſpecies, the perſon to whom it belonged before this change cannot pretend to be its owner afterward †, and it falls to the proprietor of the ſtatue whoſe right is not changed; the ſtatue remaining a ſtatue, even though all its parts were changed, if by theſe changes the nature of the whole has not been hurt: in the ſame way that a college or a tribunal would not ceaſe to ſubſiſt, even though all its members ſhould happen to die ‡. It has then on good grounds been decided, that the ſtatue, with all that has been added to it, remain his to whom it belonged before the changes in queſtion ||.

* L. 26. § 1. A. R. D. † D. l. 23. § 5. ‡ L. 77. ff. de judic.

|| In quibus propria qualitas ſpectaretur, ſi quid additum erit, toti cedi: ut ſtatuæ pes aut manus, ſcypho fundus aut anſa, navi tabula, ædificio cementum; N. B. tota enim ejus ſunt cujus antea fuerant. *L.* 68. § 1. *A. R. D. add. l.* 81. *R. V.*

§ 23.

§ 23.

It is the ſame with reſpect to the bodies which we call compound (*de corporibus connexis*), with reſpect to which it is equally rational, that the proprietor of the principal part ſhould acquire, by the right of acceſſion, that which is leſs principal *. For by acceſſion this laſt ceaſes to have the ſame form, and becomes a part of that which prevails † (*rei prævalentioris.*) Whence it follows, that the preceding ſpecies is, as it were deſtroyed, and that the firſt proprietor conſequently cannot pretend that there is any thing in the whole which is his ‡; this whole belonging to him who is proprietor of the prevailing thing ‖ (*rei prævalentioris.*)

§ 24.

But to acquire any thing by the right of acceſſion (*jure acceſſionis*), it is requiſite,

I.) That the leſs principal thing (*res minus principalis*) be added to another which prevails over it, and that the proprietor of the one be different from the proprietor of the other; wherefore it would be called *ſpecification*, and not acceſſion, if one made a new ſpecies of materials belonging to another, without adding to it any materials belonging to himſelf **.

* Seja legavit unionem cum hyacintis, poſtea in aliam ſpeciem ornamenti convertit, legatum peti non poteſt. Nam quid fieri poteſt, ut legatum durare exiſtimetur; *cum id, quod teſtamento dabatur, in ſua ſpecie non permanſiſſet; et quodam modo extinctum ſit, l.* 6. § 1. *ff. Aur. leg.* Mutata enim forma prope interimitur ſubſtantia rei, *l.* 9. § 3. *ad exhib.* et res abeſſe videntur etiam hæ quarum corpus manet, forma mutata eſt. *L.* 13. § 1. *V. S.*

† L. 23. § 5. Rei vind.

‡ D. L. 6. § 1. d. L. 9. d. L. 13. et L. 26. pr. ff. A. R. D. ibi, quia cupreſſus, i. e. eſt arbor, non maneret.

‖ D. L. 23. § 5. R. D. L. 27. § 1. A. R. D.

** D. L. 26. § 1. Add. L. 61. ff. Rei. vind. ibi: Minucius interrogatus, ſi quis navem ſuam aliena materia refeciſſet, num nihilominus navis ejuſdem maneret? Reſpondet manere.

Neither

Neither would it be acceſſion, if a perſon had made a whole of materials indeed different, but which both belong to himſelf. For having already the property of them, he would not need to acquire it by right of acceſſion.

§ 25.

II.) To acquire by this method, it is requiſite, in the ſecond place, that a leſs principal thing (*res minus principalis*) be added to another which prevails over it (*rei prævalentiori.*)

A thing is reckoned principal (*prævalentior*) in two ways, 1.) When acceſſion cannot ſubſiſt without it*. 2.) When the thing added to it is added for ornament †.

N. 1. Firſt, then, a thing prevails, and has the better of another, when acceſſion cannot ſubſiſt without it.

Whence it follows,

1.) That if a man cauſe his coat to be embroidered with gold or ſilver belonging to another, or cauſe his wool to be dyed with precious colours which are not his own, the coat and wool are the principal things which prevail over the others ‡.

2.) That if a man cauſes an arm which belongs to another to be added to his ſtatue, the ſtatue is the principal thing which prevails over the arm ‖.

3.) That if a tree or any other plant be planted in another's ground, the ground is the principal thing which prevails over what is planted in it **.

* Sed neceſſe eſt ei res cedi quod ſine illa eſſe nequit. *L.* 23. § 6. *R. V.*

† Quoniam hoc ſpectamus quæ res cujus ornandæ cauſa fuerit adhibita, non quæ ſit prætioſior. *L.* 19. § *ff. Aur. leg.* et ibid. *L.* 13. Semper enim cum quærimus cui quid cedat illud ſpectamus, quid cujus res ornandæ cauſa adhibetur. Ut acceſſio cedat principali.

‡ § 26. R. D. L. 26. A. R. D.

‖ L. 23. § 28. R. V. ** L. 26. § 1. A. R. D.

4.)

4.) That if a man build on another's ground, the ground is the principal thing which prevails over the other. See below, § 27.

5.) That if, in the reparation of a houſe, another's materials be employed, the houſe is the principal thing which prevails over the materials. See the end of the following ſection.

6.) That if a man build upon his own keel (*carina*) a ſhip, and uſe in it planks belonging to another, the keel is the principal thing which prevails over the planks *.

7.) That if a man ſow upon his own ground ſeed belonging to another, the ground is the principal thing which prevails over the ſeed †.

8.) That if a man paint a picture, though even of great value, upon a board or canvas belonging to another, the board and canvas are the principal things. See what, notwithſtanding this, has been regulated in favour of painting at the end of the following ſection ‡.

But it cannot be ſaid that there is a principal thing (*res prævalentior*) between two things which do not change their ſpecies, and which remain ſuch as they were; as happens when a man drives a ſheep into a ſtrange flock, or when one carries dung to a place which does not belong to him ‖.

N. 2. It has alſo been ſaid, that a principal thing (*res prævalentior*) is that to which another is added by way of ornament.

For this reaſon, the coat which a man cauſes to be embroidered with gold which does not belong to him, and the wool which one cauſes to be dyed with valuable colours, which are not his own, are the principal

* L. 61. § 1. R. V. † § 31. 32. Inſt. rer. div.
‡ L. 9. § 1. A. R. D. l. 23. § 3. et 4. R. V.
‖ L. 23. § 5. R. V. l. 5. § 3. ad exhib.

things which prevail over the gold and the valuable colours.

A ring continues always the principal thing *, ſuppoſing even that a diamond of great price were ſet in it, which would be an acceſſory thing with reſpect to the ring. But if, in ſetting a diamond or a jewel in gold, that gold were only employed as an ornament to the jewel, in this caſe the jewel would be the principal thing, and have the preference over the gold †.

To know then whether the gold has been uſed ſolely as an ornament, one needs only examine the uſe which has been made of it ‡, and judge of that from the uſe of the whole (*ex uſu rei et conjuetudinis*), which will ſhow which of the two, the gold or the jewel, is to be regarded as the principal. It is conſequently undoubted, that if, to adorn a vaſe, it were ſet off with jewels, the vaſe would be the principal thing, which would have the preference over the jewels ||.

N. 3. Obſerve in fine, that when the two things joined together are of an equal price, and of the ſame materials, for example, if gold be joined with gold, or ſilver with ſilver, each of the proprietors may claim his own ſhare.

§ 26.

III. To acquire by a right of acceſſion, it is alſo requiſite, that the two things joined together cannot be entirely ſeparated. For if a ſeparation can be made, the proprietor of the leſs principal part may demand in law that the proprietor of the prevailing part be bound to ſeparate the firſt from it, to produce

* L. 6. ff. ad exhib.
† L. 19. § 15. 18. 20. Aur. leg.
‡ L. 29. § 1. Aur. leg. l. 32. § 5. eod.
|| L. 19. § 13. Aur. leg.

it

it in its firſt ſtate *, and to reſtore it to him with all its dependencies, (*cum omni cauſa.*) See above, tit. IV. art. II. § 46.

If it happen then that a perſon ſhould cauſe to be ſet in his own ring a diamond belonging to another, its ſpecies or form is indeed changed, nevertheleſs the owner of the diamond does not loſe the property of it; and he may claim it after having previouſly demanded it to be exhibited, by an action *ad exhibendum.* See the preceding ſection, *N.* 2. †

In the ſame manner, if a man only cauſe to be fixed to his own ſtatue, with ſolder, an arm or a foot belonging to another, the proprietor of the arm or foot does not loſe the property, becauſe it can, without occaſioning any damage, be ſeparated from the ſtatue; but he would act otherwiſe if the arm had been added to the ſtatue by caſting or melting ‡. The reaſon of which is, that it cannot be ſeparated without damage.

N. 1. When then the ſeparation cannot be made without endamaging the things joined together, the rule eſtabliſhed above ought to take place, namely, that the proprietor of the prevalent thing acquires, by right of acceſſion, or of the whole (*jure totius*), the property of the leſs principal thing.

Thence it reſults,

That if a man cauſe his coat to be embroidered with gold belonging to another, or his wool to be dyed with valuable colours, which are not his own, he acquires, by right of acceſſion, in quality of propri-

* In omnibus, quæ ad eandem ſpeciem reverti poſſunt, dicendum eſt, ſi materia manente ſpecies duntaxat forte mutata eſt, (veluti ſi ex meo ære ſtatuam, aut argento ſcyphum feciſſes), me eorum dominum manere. *L.* 24. *ff. A. R. D. Conf. l.* 7. § 7.

† L. 6. ff. ad exhib. l. 19. § 16. eod. punct. d. l. 24.

‡ Si ſtatuæ ſuæ ferruminatione junctum ſit brachium unitate majoris partis conſumi. Non idem in eo quod adplumbatum ſit. *L.* 23. § 5. *R. V.*

etor of the coat and wool, the gold and colours which belong to another.

That if an arm or a foot belonging to another be added to a ſtatue, and that union be made by founding or caſting (*per ferruminationem*), the owner of the ſtatue acquires, by right of acceſſion or of the whole, (*jure totius*), the property of the arm or foot. See the beginning of this ſection.

That if a tree or a plant be tranſplanted into another perſon's ground, and the plant take root there, it belongs, by right of acceſſion, to the ground and its proprietor.

That if a man paint a picture upon canvas belonging to another, or if he write very artificially on paper which is not his own, the proprietor of the canvas and of the paper ought to acquire the property of the painting and writing. Nevertheleſs, the laws have determined the contrary in favour of painting, and have adjudged the canvas to the painter.

That if a man, in the reparation of his houſe, uſe bricks, lime, or other materials which are not his own, the proprietor of the houſe acquires, by right of acceſſion, all thoſe materials; and, for the ſame reaſon, the houſe itſelf, built on another's ground, is acquired to the proprietor of the ground, even though it were all of marble. This ſhall be treated more at length below, § 28.

§ 27.

Moreover, it does not follow from what has been ſaid, that the owner of the leſs principal thing ſhould loſe his right by this acceſſion. For the value of it ought to be paid to him by the proprietor of the principal thing (*rei prævalentioris*) *; but on this ſubject ſeveral caſes muſt be diſtinguiſhed.

* In omnibus igitur iſtis, in quibus mea res prævalet, alienam rem trahit, meamque efficit, ſi eam rem vindicem per exceptionem doli cogar pretium ejus quod acceſſit dare. *L.* 23. § 4. *R. V.*

N. 1.

N. 1. First, it has already been decreed, that when the two things can be separated, without damage to either, (*salva substantia*), the proprietor of the less principal thing does not lose his property, but may demand it to be separated and produced, and that he may, at the same time, claim it. See the beginning of § 26. preceding.

N. 2. Secondly, When the things joined together cannot be separated without being endamaged, the proprietor of the less principal thing does not lose his property in it altogether (*in totum*), but only so long (*in tantum*) as the union or accession lasts.

If then it happen afterward that the union come to cease, and that the less principal thing were detached from that with which it was joined, the right of the first proprietor would revive, by reason that the obstacle which hindered him from using his right no longer subsists, and that consequently he may redemand the thing *.

N. 3. But if, in the third place, the proprietor of the less principal thing do not incline to wait the chance of separation, he may demand its value by an action *in factum*.

N. 4. If, in the fourth place, the union were such that no separation could ever happen; for example, if one's wool were dyed with colours belonging to another, or if a manufacturer should put into a stuff gold belonging to another, the proprietor of the less principal thing could only demand its value.

But, in this case, it must be distinguished whether the union was made with presumptive honesty or presumptive dishonesty, *bona fide* or *mala fide*. When the union was made with presumptive honesty, the proprietor of the less principal thing, in case he be in possession of the whole, has a right of retention, (*jus*

† L. 23. § 5. R. V. l. 59. eod. l. 20. eod.

retentionis),

retentionis), till he have got the value of what was his own. But if, without getting payment of that value, he have, by miſtake, delivered the whole, he might raiſe the action called *condictio indebiti*, in virtue of which the whole would be reſtored to him.

But if the thing be in the power of the owner of that which prevails, (*rei prævalentioris*), the proprietor of the leſs principal thing has no other right but that of demanding its value by an action *in factum*.

When the union was made with preſumptive diſhoneſty, it muſt likewiſe be diſtinguiſhed, whether it be the proprietor of the prevalent, or of the leſs principal thing, who hath made or occaſioned the union of the two things.

When it is the firſt, the proprietor of the leſs principal thing may not only demand its value, both by right of retention and by an action *in factum*, but he ſhall even be allowed to prove that value by his own oath *in litem*.

When it is the proprietor of the leſs principal thing, who, with preſumptive diſhoneſty, has joined and united the two things together, he has only the right of retention with reſpect to the true value of what belongs to himſelf, in caſe he have the whole in his own power; but if the whole be in the power of the proprietor of the principal thing (*rei prævalentioris*), he would loſe all his rights in the leſs principal thing; and one would be juſtified in preſuming (*per præſumptionem juris et de jure*) that he hath made a preſent of it to the proprietor of the leſs principal thing. This matter ſhall be explained by the example of an edifice.

§. 28.

From what goes before it follows, that an edifice raiſed upon another's ground, belongs, by right of acceſſion, to the proprietor of the ground, becauſe the ground is the principal thing which prevails over the

the edifice; whence ariſes the rule, *Ædificium cedit ſolo.*

But the three following caſes muſt be diſtinguiſhed. Either the proprietor of the ground has himſelf built the edifice, and uſed in it materials belonging to another; or a man has built with his own materials on another's ground; or elſe one has built upon another's ground, and uſed in it materials which likewiſe do not belong to himſelf.

§ 29.

In the firſt caſe, when the owner of the materials was not ignorant that the proprietor of the ground employed his materials, and did not object to it, he has only an action *in factum* to get their value; but if he were ignorant of it, he has the action *de tigno junctо*, in virtue of which he may demand the double of the value, nobody being obliged to ſell his materials at the current or ordinary price.

If the proprietor of the materials have neither demanded the value, nor the double of the value, and if afterward the edifice happen to be demoliſhed by the poſſeſſor, or by any accident or chance, he may redemand his materials, becauſe there is no obſtacle to it, and the objection ariſing from the connection of the materials with the ground no longer ſubſiſts. See the preceding ſection, *N.* 2.

Claim of right is competent in this caſe, even though the poſſeſſor of the ground had poſſeſſed the edifice for thirty years, and conſequently it were preſcribed; the reaſon of which is, that he who poſſeſſes the edifice, does not poſſeſs the materials which belong to another, and conſequently they could not fall under preſcription. Whence appears the truth of what has been advanced above, § 18. that the rights of the whole (*jura totius*) are one thing, and thoſe of the parts (*partium*) another.

N. 1.

N. 1. When the proprietor of the ground uſed another's materials unfairly, that is to ſay, when he knew that they belong to another, a diſtinction muſt be made whether the edifice is ſtill ſubſiſting, or if it is deſtroyed.

If the edifice be ſubſiſting, the proprietor of the materials may raiſe the action *de tigno junctio* to get the double of their value *(in duplum)*, and join it with the action called *condictio furtiva*, or make choice of the action of theft to get the quadruple, *(actionem furti in quadruplum.)*

If the edifice be deſtroyed, all thoſe actions take place, excepting the action *de tigno junctio*; but the proprietor of the materials may alſo redemand them.

§ 30.

As to the ſecond caſe, namely, when one raiſes an edifice of his own materials, but on another's ground, the rule which we have laid down remains in its full force; whence it follows, that as the edifice is to be regarded as the leſs principal thing, it is an acquiſition to the ground on which it is built, and conſequently to the owner of that ground.

Note, that the proprietor of the materials, who has built the edifice *bona fide*, and is in poſſeſſion of it, has a right of retention till their value be paid to him, in caſe the edifice be neceſſary. If what was done were only for conveniency or pleaſure, he could only carry it away, or demoliſh it to carry off the materials; but if he be not in poſſeſſion of the edifice, he may either demand the value of his materials by an action *in factum*, or carry off and take away the edifice, if it be not neceſſary for the poſſeſſion of the ground.

If it happen that ſuch a fair poſſeſſor yields by miſtake the edifice to the proprietor of the ground without demanding its value, or if he do not demoliſh the edifice, and carry off its materials, he may ſue the proprietor

proprietor of the ground by an action called *condictio indebiti*, to be reſtored to the poſſeſſion, which he has yielded without being obliged to do ſo, (*indebite.*)

But when one who has employed his own materials to build on another's ground has done ſo unfairly, we are pleaſed, in caſe he be in poſſeſſion of the edifice, to allow him the right of retention, till he have got the value which he can prove them worth.

But if the building, inſtead of being in his own power, be poſſeſſed by the proprietor of the ground, or if he who hath raiſed the building, after having poſſeſſed it for ſome time, have yielded it to the owner of the ground by miſtake, without uſing his right of retention, and without cauſing the materials to be carried off, *&c.* our will is, that he have no longer any action againſt the proprietor of the ground, to whom he is reckoned to have made a preſent of the materials, by the preſumption of law which is called *juris et de jure.*

§ 31.

In the third caſe, when a man builds on another's ground, and uſes materials which are not his own, the edifice belongs in like manner to the ground, and to the perſon who has the property of it.

Obſerve, with reſpect to this, that if he who built, did ſo *bona fide*, and be in poſſeſſion of the edifice, he may uſe the right of retention for what he has expended; and if he do not poſſeſs it, he may demand thoſe expenſes by an action *in factum:* but if he built unfairly and fraudulently, (*doloſe*), he may uſe the right of retention with reſpect to the materials, in caſe he be in poſſeſſion of the edifice; for if he be not in poſſeſſion, it would be reckoned that he hath made a preſent of them to the owner of the ground. See the preceding ſection.

The proprietor of the materials may alſo demand their price from the proprietor of the ground by an

action *in factum*; and if the edifice happen to be demoliſhed, and he have not got as yet the value of his materials, he may redemand them.

ART. V.

Of the acquiſition of property, which takes place when one plants or ſows in another's ground.

§ 32.

AMong the acquiſitions obtained by right of acceſſion, *(jure acceſſionis)*, is reckoned that which is made, 1.) By planting a tree in another perſon's ground; becauſe the proprietor of the ground, which is the principal thing, *(res prævalentior)*, ought to have the property of every thing which makes a part of it.

Whence it follows, that this deciſion can only be applied to a tree which has taken root; for it is only by its union with another's ground, that it changes its form or ſpecies, and becomes a part of that ground.

2.) It is the ſame with any other plant, which one puts in another's ground, which becomes a part of the new ground as ſoon as it takes root there, and becomes the property of the owner of the ground, as proprietor of the principal thing, *(rei prævalentioris.)*

3.) The ſame deciſion takes place with regard to the ſeed ſown on a neighbour's land: for the land is the principal thing which prevails, *(res prævalentior)*, and the ſeed is the leſs principal thing, or acceſſory, which the proprietor of the land acquires by right of acceſſion.

But it is not neceſſary for acquiring the ſeed that it ſpring, or take root, becauſe even though it were otherwiſe, all the grains of it could not be gathered and taken back.

§ 33.

§ 33.

As to the actions which the proprietor of the tree, of the plant, or of the ſeed, may raiſe, they have been mentioned in the preceding article.

ART. VI.

Of the method of acquiring the property of things taken from an enemy.

(De occupatione rei hoſtilis.)

§ 34.

THE Roman laws have reckoned among the methods of acquiring property, according to the law of nations, prizes taken from an enemy.

But we do not allow this method, excepting in the three following caſes;

1.) When the prizes have been taken from the enemy by our regular troops. Stragglers, then, and ſuch as are called in German, *Schuaphahnen*, and ſuch like, far from acquiring the prizes which they ſhall take from the enemy, ſhall be puniſhed as robbers and highwaymen.

2.) When the prizes conſiſt in moveable things; for immoveable things are always taken in name of the public.

3.) When ſuch as have taken the prizes have them in their own poſſeſſion and keeping; that is to ſay, have put them in entire ſafety; which cannot be ſaid till they be carried into ſome town or fortified place, either of our dominions, or of the enemy's country of which we may be poſſeſſed.

Conſequently, if before our troops have ſecured their booty, the enemy happen to retake it, our ſoldiers could not pretend to have acquired the property of it;

and the effect of this deciſion is, that if other ſoldiers take the ſame prizes a ſecond time, the firſt ſoldiers would have no right in it, and could not conſequently redemand it.

§ 35.

The things which the enemy ſhall take from our ſubjects in time of war ſhall not be loſt to them, if by negotiations, or the laws of war, they fall again into our power; for as it is ſuppoſed that they were unjuſtly taken by the enemy, thoſe to whom they belonged muſt neceſſarily be intitled to redemand them by right of recovery or repriſal, (*jure poſtliminii.*)

The ſame ſhall be the caſe when thoſe things ſhall be carried into the limits of our allies, but not when they ſhall be carried into a neutral country.

In both caſes the proprietor of the things carried off by the enemy ſhall be bound to reimburſe what may be expended for their preſervation.

§ 36.

A perſon does not then entirely loſe the property of things carried off by the enemy, becauſe there may be hopes of recovering them by the right of repriſal, (*jure poſtlimini,*)

§ 37.

It is aſked, if our ſubjects may avail themſelves of the right of repriſals, (*jure poſtlimini*), to redemand things taken by the enemy during the war, when after concluſion of the peace thoſe things are carried into the country by commerce, or in any other way? But conſidering that by the peace all injuſtices committed during the war are pardoned, our will is, that in this caſe the right of recovery or repriſal (*jus poſtlimini*) do not take place, and conſequently that neither the enemy who hath taken any thing from our ſubjects, nor ſuch of ours as have taken any thing from him can be diſturbed.

§ 38.

§ 38.

As to things that ſhall be carried away from our ſubjects in a tumult, or on occaſion of a rebellion, or by a band of foreign robbers, it is juſt that they always preſerve the property of them; wherefore they may redemand them where-ever they ſhall be recovered, without the neceſſity of uſing the right of repriſal, (*jure poſtliminii*), which only takes place with regard to what is taken by an enemy.

ART. VII.

Of the method of acquiring property by alluvion.

(De alluvione.)

Where we ſhall treat at the ſame time of the method of acquiring new iſles, pieces of ground, (cruſta), *channels forſaken by rivers or rivulets,* (alveum derelictum.)

§ 39.

ALluvion ought alſo to be reckoned among the natural methods of acquiring the property of a thing.

§ 40.

Alluvion is what the motion and violence of the waters take off from a neighbouring heritage, and add to our ground by an imperceptible accretion.

§ 41.

This imperceptible accretion is acquired then to the ground, to which it is added by the motion of the waters of the river, which inſenſibly lay upon it earth and ſand.

§ 42.

The foundation of this acquiſition is, in like manner,

ner, taken from the right of acceſſion; for the ſand is a leſs principal thing, which, by uniting to grounds, whoſe proprietor is different from that whence it was carried, becomes a part of that other man's ground, as of the principal thing, (*rei prævalentioris*), and conſequently changes its form and ſpecies.

§ 43.

Obſerve nevertheleſs, that there is a difference between alluvion and the other methods of acquiring property by the right of acceſſion. It conſiſts in this, that the firſt proprietor of the ſand or earth cannot redemand it, becauſe it can never be proved that this portion or accretion of earth or ſand, which his neighbour acquires by alluvion, ever belonged to him.

§ 44.

Obſerve farther, that the right of alluvion takes place only in unmeaſured lands, and when the grounds have no other limits but the river; ſuch are thoſe which are called *fundi arciſinii*. In this caſe the river marks always their boundaries, though the lands, according to its courſe, be ſometimes more extenſive, and ſometimes leſs. It is likewiſe the ſame with lands near the ſea, when the proprietors have been inveſted in the coaſts.

§ 45.

The acquiſition of property by alluvion (*per alluvionem*) does not take place then,

1.) When a certain number of acres, called *morgen*, or *huffen*, are aſſigned to the poſſeſſor of the ground, enlarged by an imperceptible accretion: for in this caſe all that exceeds the number of acres granted to him has no owner, (*eſt res nullius*), and conſequently belongs to our royalties.

2.) When the accretion happens in rivers which belong to private perſons; becauſe the eſtates of private perſons in which thoſe running waters are alſo included,

included, are uſually ſeparated by certain and fixed boundaries, and conſequently common to both neighbours.

Whence it follows, that if ſuch a river is to ſerve for boundaries and a ſeparation between two neighbours, the middle of the river is evidently their limits, which conſequently cannot be changed nor altered by any inundation whatſoever.

3.) When they are ſtill waters, which, having no current, may indeed riſe or fall, but make no alteration in the banks.

§ 46.

The Roman laws have decided, in the ſame manner, with reſpect to iſles formed in rivers, or in the ſea, and with reſpect to the channels of rivers when they leave them with impetuoſity, and make to themſelves all at once other channels. By the Roman laws, then, the neareſt neighbour of the new iſle, or of the channel which the river had left, acquired the property of them, when they were grounds having certain limits, (*de limitatis fundis*), and not of grounds whoſe limits were marked by the river, (*de fundis arciſiniis*), which nevertheleſs were not extended to the new channel of a river formed by degrees, and in an imperceptible manner, of which the property was acquired by alluvion: but new iſles, as well as rivers and their channels, being, according to the conſtitution of the German empire, included in our royalties, the proprietors of the neighbouring lands cannot aſſume any right in thoſe things, whether their lands have certain limits, or be only bounded by the river, (*fundi limitati vel arciſinii.*)

§ 47.

It happens ſometimes that a whole piece of ground is carried off from lands by a rapid current, and added to other lands.

In

In this caſe it muſt be diſtinguiſhed, whether this piece or bit of ground is united to the other lands, ſo that they make together but one whole, or if it be otherwiſe.

In the firſt caſe, the new poſſeſſor acquires that piece of ground, whether it be bounded by the river, *(fundus arcifinius)*, or have certain limits.

But he who has made an acquiſition of this bit of ground is obliged to pay its value to the firſt proprietor, or elſe to allow him to take it back.

In the ſecond caſe, when this bit of ground does not adhere, and is annexed to the new lands, he to whom it belongs may redemand it as his own, whether the lands toward which it is driven be bounded only by the river, or have certain limits.

§ 48.

When a river ſhall all at once leave its old channel, and form to itſelf a new channel, the channel left ſhall not be divided among the proprietors of the neighbouring lands, but it ſhall belong to our royalties, whether thoſe lands have certain limits, or be bounded only by the river.

ART. VIII.

Of the method of acquiring property, by the enjoyment and receipt of the fruits of a thing belonging to another.

(Perceptione ex re aliena.)

§ 49.

IN the third part ſhall be explained what is to be underſtood by fruits, and of how many ſorts they are.

§ 50.

§ 50.

Fruits are a part or portion of the thing which produces them; conſequently they can belong naturally only to the proprietor of the thing, unleſs, 1.) Another have a right to appropriate them to himſelf; or, 2.) Have gathered thoſe fruits, and be poſſeſſed of them.

§ 51.

The firſt exception to the rule takes place,

a) When a man poſſeſſes a thing on a lawful title and fairly, (*bona fide et juſto titulo*), and when believing himſelf owner of it, he enjoys the fruits which it produces. We ſhall ſpeak of this more at length in § 54.

b) When a man has granted to another the enjoyment of a ſubject by a right of ſervitude. See book IV. tit. III. *(jure ſervitutis.)*

c) When a man yields to a farmer, or to any ſuch perſon, the right of enjoying a ſubject.

§ 52.

The ſecond exception which particularly regards this ſubject takes place, when a man gathers and lays up the fruits of a tree belonging to another, or when he reaps on another's field, and takes the crop of it to himſelf. He acquires, by this deed, even according to the law of nature, the full property of the fruits, and of his reaping, even though he may have done it unfairly.

For with regard to the fruits of trees, it is very true, the proprietor of the tree has alſo the property of the fruits which it produces as long as they hang on the tree, becauſe thoſe fruits make a part of the whole which belongs to him; this the lawyers call *jus totius*, right to the whole; but as ſoon as they are ſeparated from it, they make no longer a part of the tree, and conſequently belong no more to the pro-

prietor of the tree, but receiving by this deed a new form or quality, they belong to the perſon who has given it to them; that is to ſay, to him who has gathered them.

§ 53.

It is quite the ſame with reſpect to grains. They make in like manner a part of the grounds while they are growing on them, and by right of the whole (*jure totius*) belong conſequently to the proprietor of the grounds: but when they are reaped and laid up in barns, they make no longer a part of the grounds, and conſequently belong no more to the proprietor of the ground; for they are become a new ſpecies, which never belonged to the proprietor of the ground, and conſequently they are acquired to the perſon who gave them this new form, that is to ſay, to him who reaped them.

§ 54.

It follows from what has been decreed, that if, in gathering the fruits of a tree belonging to another, or in reaping another's field, one have acted fairly. (*bona fide*), he cannot be obliged to reſtitution, unleſs, a) The fruits ſtill exiſt in kind; or, b) Unleſs having been conſumed, the perſon who has enjoyed them have become richer for them. This has been explained at great length in the title of *claim of right*. See above, book II. tit. IV. art. I. § 25.

But one who acting unfairly, (*mala fide*), and knowing very well that the tree and the field belong to another, nevertheleſs gathers the fruits of them, and appropriates them to himſelf, is bound not only for all damage and intereſt which the proprietor of the ground can prove by his own oath *in litem*, but he may even be proſecuted in an action of robbery, (*actione furti.*) See above, book II. tit. IV. art. I. § 27.

§ 55.

§ 55.

When the fruits, inſtead of being gathered from a tree belonging to another, fall of themſelves upon a neighbour's ground, on account of the branches which extend thither, the proprietor has the liberty of cauſing them to be gathered up within the ſpace of three days.

And if he were hindered from ſo doing by the proprietor of the ground, he might ſue him at law for his right, by virtue of the interdict *de glande legenda.*

If the proprietor of the ground had gathered up the fruits during the three days after their fall, the proprietor of the tree might redemand them in a claim of right.

But after the three days are elapſed, the proprietor of the ground acquires the full property of the fallen fruits gathered by him.

The proprietor of the ground who would avoid ſuch diſcuſſions with his neighbour, may cauſe to be cut all the branches of his neighbour's tree which overſpread his ground. This ſhall be mentioned in the title *de glande legenda.*

ART. IX.

Of the method of acquiring the property of what is produced by animals belonging to us.

(Jure ventris.)

§ 56.

THE brood of animals impregnated by a male belonging to another, is acquired, according to the law of nature, by the proprietor of the female.

For the ſeed which fecundates the female ceaſes to make a part of the male, and becomes a portion of the

female; whence it follows, that the proprietor of the male loſes his right to the ſeed, and the proprietor of the female acquires the property of it, as well as of the animals produced by it, as being owner of the female, and of all its parts.

The proprietor of the female is not even obliged to pay any thing for this ſeed, becauſe being regarded as a natural excrement, it has no price, and is not reckoned to make a part of one's property, ſo much the more that in fact the proprietor of the male ſuffers no diminution of his effects by loſs of the ſeed.

ART. X.

Of the method of acquiring property by the delivery or tradition of a thing.

(Per traditionem.)

§ 57.

DElivery, or tradition, is an act which paſſes between two perſons, of which the one puts and delivers a thing into the power of the other.

§ 58.

Delivery or tradition is made either effectually and really, (*vere*), or by fiction and ſymbolically, (*ficte.*)

§ 59.

Real tradition (*vera traditio*) ſuppoſes a thing to be effectually and really transferred from hand to hand, and thus to paſs into the poſſeſſion and keeping of another. It takes place with reſpect to immoveable things, when the perſon to whom it is intended to deliver them is brought to the place of their

their ſituation, and they are, in that manner, put into his hands. It may be obſerved on this occaſion, that the new poſſeſſors are accuſtomed to uſe certain ſuperfluous formalities; as, to take off ſome cops off an edifice, to kindle fire on the hearth, to carry off a piece of earth from the grounds, *&c.*

Fictitious tradition (*ficta traditio*) takes place when the thing is not really delivered, and a perſon only ſhows it. It is then a fictitious delivery,

I.) When it is performed by the fiction called *fictio longæ manus*; that is to ſay, when the perſon who wants to deliver to another, for example, a land-eſtate which he has before his eyes, ſhows it to him at a diſtance, and gives him power to take poſſeſſion of it.

II.) When it is performed by the fiction called *fictio brevis manus*, that is to ſay, when the proprietor of a moveable thing preſent ſhows it to another, and gives him power to carry it away.

III.) When this is performed by what is called in law *conſtitutum poſſeſſorium*, namely,

a) When a perſon who has already delivered a thing to another declares that he ſhall poſſeſs it for the future by virtue of another right, (*ex alia et nova cauſa*); for example, if a thing being depoſited with a man be afterwards ſold to him, or elſe given him, left him in legacy, *&c.*; in which caſes he has no need of a new delivery.

b) When a thing is ſold to another, *&c.* and the uſufruct of it reſerved; or, when having given a donation of a land-eſtate, a man takes it in farm from the donatary, which is alſo a fictitious tradition; for the proprietor declares thereby that he will no longer poſſeſs the thing for himſelf, and in his own name, but for another, and in that other's name.

c) When a perſon gives his eſtate in pledge or mortgage to another, with the clauſe *cum conſtituto poſſeſſorio*;

ſorio; by which is underſtood, that the debtor ſhall henceforth poſſeſs the eſtate only in name of his creditor, which has the effect of tradition, and gives to the creditor a real right upon the eſtate, (*jus in re.*)

IV.) Fictitious tradition or delivery takes place alſo, when it is performed in a ſymbolical manner, (*per ſymbola*), as happens when having ſold a thing which one has not really delivered, the buyer puts his ſeal on it, or when the ſeller delivers to the buyer the deeds and documents of a land-eſtate, or the keys of a houſe which he has ſold, which are reckoned delivered thereby, though that be performed without having the houſe or the eſtate in their ſight.

§ 60.

Tradition, in the ſecond place, is diſtinguiſhed in another ſenſe into real and ſuppoſed, (*in veram et quaſi traditionem.*)

Real tradition takes place in this meaning only with reſpect to corporeal things; for rights (*jura*) are not of a nature to be capable of being delivered and taken into keeping; and this is the reaſon that a perſon who tranſmits to us the uſe and exerciſe of them, is reckoned to have delivered them.

§ 61.

The property of a thing is acquired by delivery, 1.) When the perſon who delivers it has a right to do ſo; 2.) When he to whom it is delivered has accepted it, and was capable of accepting it; and, 3.) When the delivery was made in virtue of a good title to transfer the property (*ex titulo dominii tranſlativo.*)

§ 62.

That tradition may be a mean of acquiring property, it is then requiſite,

I.) That the perſon who would transfer to another the property of a thing have the right and power to diſpoſe

poſe of it; whence it follows that the delivery of a thing which belongs to another does not transfer the property of it, no more than a delivery performed by a furious or fatuous perſon, a child, *&c.* of things which belong to them, but of which they have not the liberty to diſpoſe.

§ 63.

II.) It is requiſite, in the ſecond place, that the perſon to whom a thing is delivered accept of it, becauſe it is not natural that one ſhould acquire what he does not accept. Beſides that, the accepter muſt not be incapable of accepting; that is to ſay, he muſt have the uſe of his reaſon, and liberty to adminiſter his own effects, and to diſpoſe of them, (*facultatem diſponendi.*)

§ 64.

III.) It is requiſite, in the third place, that the delivery be made by virtue of a title fit to transfer property, (*ex cauſa dominii tranſlativa.*) It is not then, for example, a title fit to transfer property, though it be followed with delivery, when the proprietor of a thing lends it to one, or depoſits it; or when the owner of a land-eſtate ſets it in farm.

§ 65.

Lawyers have here put the queſtion, whether the property of a thing ought to be acquired, when it was done without cauſe, or when the cauſe of the delivery was erroneous, or unjuſt, or ſcandalous?

We decide the queſtion agreeably to the principles of the Roman law; willing that, in ſuch caſes, the property be transferred and acquired by him to whom the delivery ſhall be made, becauſe it is ſufficient for that purpoſe that one have been willing to transfer to another the property of what belongs to him.

A perſon, nevertheleſs, who, by miſtake or without cauſe, ſhall deliver a thing to another, cannot redemand

mand it, becauſe it is by his own conſent that he ceaſed to be proprietor of it; but he may redemand it by virtue of the perſonal action called *condictio indebiti et ſine cauſa*, as a thing which he has delivered to another without being bound to it (*indebite*), or which another hath kept without cauſe, after the delivery made to him. See part III.

If a perſon delivers a thing to another for a cauſe which the laws condemn, or which is againſt honeſty and good manners, it ſhall not be the deliverer, but the fiſcal, who ſhall have power to redemand it, by virtue of the action called *condictio indebiti et ſine cauſa*. See ibid.

§ 66.

It follows from what has been ſaid, that the property of a thing is not transferred nor acquired by a ſimple agreement, or covenant, (*pacto*), unleſs the covenant be followed by delivery.

It muſt nevertheleſs be obſerved, that there are caſes in which property is acquired according to the laws, even though delivery of the thing ſhould not be made, for example, the delivery of a thing is not neceſſary between partners, who have contracted together a general copartnerſhip of all their effects; nor when a guardian buys any thing in his pupil's name.

§ 67.

Tradition has beſides ſeveral effects and privileges, namely,

a) When the ſame thing has been ſold to two perſons, he to whom it was firſt delivered has the preference.

b) While the ſeller has not delivered the thing to the buyer, the ſeller runs all the riſks of it.

c) Two perſons cannot be at the ſame time (*in ſolidum*) proprietors of the ſame thing; wherefore he to whom it was firſt delivered is the proprietor.

d) When

d) When the proprietor of a land-eſtate farms it out to a tenant, and afterwards reſolves to ſell it, the ſale breaks the leaſe; but the buyer cannot put out the farmer till after he has got delivery of the eſtate.

ART. XI.

Of the method of acquiring property by ſucceſſion.

SUcceſſion to a perſon inteſtate is alſo a natural method of acquiring property. For reaſon teaches us that all ſuch as are members of one family impart to each other ſucceſſively all the rights annexed to that family, as long as there remains any one of them; and for that reaſon the children, who perpetuate the family, are by right owners of the things left in the family.

As ſucceſſions are alſo given by will, and conſequently in virtue of the civil laws, we have thought proper to treat that ſubject, which is very extenſive, in two particular books, to which we refer.

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